FEDERAL HOUSING FINANCE BOARD

12 CFR Part 908

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1209

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of Federal Housing Enterprise Oversight

12 CFR Part 1780

RIN 2590–AA14

Rules of Practice and Procedure

AGENCIES: Federal Housing Finance Board; Federal Housing Finance Agency; and Office of Federal Housing Enterprise Oversight.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is adopting a final rule to implement the Housing and Economic Recovery Act of 2008 (HERA) amendments to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) and the Federal Home Loan Bank Act (Bank Act) governing civil administrative enforcement actions by FHFA, under which FHFA's authority was consolidated to initiate enforcement proceedings against the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (together, the Enterprises), the Federal Home Loan Banks (the Banks) (collectively, the regulated entities), and their entity-affiliated parties. This rule removes the existing Rules of Practice and Procedure of the Federal Housing Finance Board (Finance Board) and the Office of Federal Housing Enterprise Oversight (OFHEO), and establishes new FHFA regulations.

DATES: This rule is effective September 26, 2011.

FOR FURTHER INFORMATION CONTACT: Stephen E. Hart, Managing Associate General Counsel, Federal Housing Finance Agency, 1700 G Street, NW., Fourth Floor, Washington, DC 20552, telephone (202) 414–8960 (not a toll-free number). The telephone number for the Telecommunications Device for the Deaf is: (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Supplementary Information is organized according to this table of contents:

I. Background

A. Regulatory History

On August 12, 2010, FHFA published for comment a proposed rule to implement the provisions of HERA authorizing FHFA to take civil enforcement actions in accordance with sections 1371 through 1379D of the Safety and Soundness Act under specified conditions. 75 FR 49314 (proposed rule). The proposed rule included proposed Rules of Practice and Procedure for hearings on the record in enforcement actions, rules of practice governing individuals who practice before FHFA, provisions for periodic civil money penalty adjustments, and the rules governing suspension or removal of an entity-affiliated party charged with a felony. The comment period closed on October 12, 2010.

FHFA received two comment letters on the proposed rule, one from the 12 Banks and the other from two trade associations, that generally were supportive of the proposal, and recommended ways in which the regulation could be amended to better achieve its objectives. A discussion of those comments follows. The key substantive issues raised by the comment letters focused principally on procedural refinements, whether the procedures for hearings would apply to enforcement actions on housing goals, and whether the rule was intended to cover investigative subpoenas. In this final rule, FHFA has incorporated certain revisions suggested by these commenters, but in other respects retains the substance of the proposed rule for the reasons stated in the comment summary below.

B. HERA Amendments

On July 30, 2008, HERA, Public Law No. 110–289, 122 Stat. 2654, became law and created FHFA as an independent agency of the Federal government.[1] Among other things, HERA transferred to FHFA the supervisory and oversight responsibilities over the Enterprises, previously vested in OFHEO, and the Banks, which had been regulated by the Finance Board. HERA established FHFA as the financial safety and soundness regulator to oversee the prudential operations of the regulated entities and to ensure that they operate in a safe and sound manner; remain adequately capitalized; foster liquid, efficient, competitive and resilient national housing finance markets; comply with the Safety and Soundness Act and their respective authorizing statutes, as well as all rules, regulations, guidelines, and orders issued under law; and carry out their missions through activities that are authorized by law and are consistent with the public interest. *See* 12 U.S.C. 4513. The Enterprises and Banks continue to operate under regulations promulgated by OFHEO and the Finance Board, respectively, until such time as the existing regulations are supplanted by regulations promulgated by FHFA.[2]

C. HERA-Enhanced Enforcement Authority

Because the regulated entities play a key role in housing finance and the U.S. economy, and FHFA's mission is to provide effective supervision, regulation, and housing mission oversight of the Enterprises and the Banks, HERA amended the Safety and Soundness Act to make explicit the general regulatory and supervisory authority of FHFA and the Director. *See generally,* 12 U.S.C. 4511, 4513, 4517, 4518, and 4526. The HERA amendments to sections 1371 through 1379D of the Safety and Soundness Act (12 U.S.C. 4631 through 4641) authorize the Director to initiate administrative enforcement proceedings to issue cease and desist orders and temporary cease and desist orders and to impose civil money penalties against regulated entities, entity-affiliated parties, and the Office of Finance of the Federal Home Loan Bank System, in accordance with applicable law.

Additionally, the HERA provisions in section 1377(a) of the Safety and Soundness Act (12 U.S.C. 4636a(a)), give the Director express authority to suspend or remove from office, or to prohibit any further participation in the conduct of the affairs of a regulated entity, an entity-affiliated party, or any officer, director, or management of the Office of Finance, for any violation, practice, or breach of such party's fiduciary duty, as set forth therein. Thus, in accordance with section 1377(b) of the Safety and Soundness Act (12 U.S.C. 4636a(b)), the Director can

[1] *See generally*, HERA, Division A, Titles I–III, Public Law 110–289, 122 Stat. 2654, sections 1101 *et seq*. (July 30, 2008). Specifically, section 1101 of HERA amended section 1311(a) of the Safety and Soundness Act, Title XIII, Public Law 102–550, 106 Stat. 3672, 3941–4012, sections 1301 *et seq*. (1992), to establish FHFA as an independent agency of the Federal government. *See* 12 U.S.C. 4511(a).

[2] The existing regulations are enforceable by the Director, until such time as they are modified, terminated, set aside, or superseded by the Director, as provided by HERA sections 1302 and 1312, 122 Stat. 2795, 2798. *See also* 75 FR 49314, 49315, n. 6.

take immediate action to suspend or remove from office, or to prohibit the participation in any manner in the conduct of the affairs of the regulated entity, any party subject to an action under section 1377(a) of the Safety and Soundness Act.

Moreover, under section 1377(h) of the Safety and Soundness Act (12 U.S.C. 4636a(h)), with respect to any entity-affiliated party who is charged with a Federal or state crime involving dishonesty or breach of trust, which is punishable by imprisonment for more than one year, in any criminal information, indictment or complaint, the Director is authorized to suspend such party from office or prohibit him or her from any further involvement in the conduct of the affairs of a regulated entity if continued service or participation by such party could pose a threat to, or impair public confidence in, the regulated entity. *See* 12 U.S.C. 4636a(h)(1)(A). The statute prescribes that a copy of the suspension notice shall be served on each relevant regulated entity, *see* 12 U.S.C. 4636a(h)(1)(B)(i), and specifies streamlined procedures for such actions.

Prior to HERA section 1379B of the Safety and Soundness Act (12 U.S.C. 4641) established the subpoena power of the Director in administrative proceedings. Under the HERA amendments, section 1379D of the Safety and Soundness Act makes explicit agency subpoena powers in investigations and examinations, and authorizes any designated representative of the Director to issue, revoke, quash, or modify a subpoena or subpoena *duces tecum,* as follows:

> In the course of or in connection with any proceeding, examination, or investigation under this chapter, the Director or any designated representative thereof, including any person designated to conduct any hearing under this subchapter shall have the authority * * * to revoke, quash, or modify subpoenas and subpoenas *duces tecum.*

12 U.S.C. 4641. This provision, however, should not be read to subject investigative subpoenas, subpoenas issued in connection with an examination, or conservator and receiver subpoenas to the procedural requirements that would apply in administrative enforcement proceedings.

Thus, under these enhanced powers, the Director has at his or her disposal a broad range of enforcement mechanisms to enforce, as needed, applicable law, rules, orders, and agreements pertaining to the safe and sound operation of the Enterprises and Banks.[3] In fact, much of FHFA's enforcement authority parallels that of the Federal bank and thrift regulators who adopted uniform rules of practice and procedure for enforcement actions pursuant to section 916 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Public Law 101–73, 103 Stat. 183 (1989) (Uniform Rules). The Uniform Rules set the standard for formal enforcement proceedings, and served as the model for the enforcement regulations adopted by the Finance Board in 2002 (12 CFR part 908) and OFHEO in 1999 (as amended in 2001) (12 CFR part 1780).[4]

FHFA has determined mainly to adopt these procedures, with some changes that reflect the differences in the respective regulatory structures. Thus, the final rule builds upon the Uniform Rules and the rules previously adopted by the Finance Board and OFHEO.

Cease and desist enforcement proceedings are commenced by serving a notice of charges that is to set forth the facts constituting the practice or violation and fix a time and place for a hearing to determine on the record whether an order to cease and desist from such practice or violation should issue. *See* 12 U.S.C. 4631(c)(1). Such hearings are governed by section 1373 of the Safety and Soundness Act. *See generally,* 12 U.S.C. 4633. In fact, section 1373(a)(1) of the Safety and Soundness Act (12 U.S.C. 4633(a)(1)) requires that any hearing under sections 1371 (cease and desist order), 1376(c) (civil money penalty assessment), or 1377 (removal or suspension orders; except removal actions under section 1377(h) of the Safety and Soundness Act) be held on the record and conducted in accordance with sections 554, 556, and 557 of the Administrative Procedure Act (APA).[5] *See* 12 U.S.C. 4633(a)(1), (3).

Therefore, prior to issuing a cease-and-desist order, imposing civil money penalties, or ordering the suspension or removal of an entity-affiliated party or any officer, director, or management of the Office of Finance, FHFA must conduct a hearing on the record and provide the subject of such an order with notice and the opportunity to participate in a formal hearing. The final rule establishes the procedural requirements for any such hearing on the record.[6]

D. The Proposed Rule

The proposed rule was to govern administrative hearings on the following matters that FHFA by law must conduct on the record under APA formal hearing requirements:

(1) Enforcement proceedings under sections 1371 through 1379D of the Safety and Soundness Act (12 U.S.C. 4631 through 4641) (except section 1377(h) (12 U.S.C. 4636a));

(2) Removal, prohibition, and civil money penalty proceedings for violations of post-employment restrictions imposed by applicable law; and

(3) Proceedings under section 102 of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012a), to assess civil money penalties.

Because the procedural framework for formal hearings on the record is appropriate for other types of enforcement actions, the formal hearing procedures were enumerated separately in subpart C of the proposed rule. The procedural framework established in subpart C of the proposed rule may accommodate formal enforcement actions under sections 1341 and 1345 of the Safety and Soundness Act pertaining to the achievement of housing goals and enforcement actions to enforce the regulated entities' reporting requirements under section

[3] The Director has broad safety and soundness enforcement authority under sections 1371 through 1379D of the Safety and Soundness Act, (subtitle C—Enforcement Provisions) (12 U.S.C. 4631 through 4641), in furtherance of the Director's general safety and soundness regulatory authority. Additionally, the Director has authority under subtitle B of the Safety and Soundness Act (sections 1361 through 1369E) to set and enforce capital levels or to appoint FHFA as conservator or receiver for a regulated entity. More important, as amended by HERA, section 1311(c) of the Safety and Soundness Act expressly preserves these powers in addition to the Director's general supervisory and regulatory authority under subsection (b) of section 1311 of the Safety and Soundness Act, as amended: ''[t]he authority of the Director to take actions under subtitles B and C shall not in any way limit the general supervisory and regulatory authority granted to the Director under subsection (b).'' *See* 12 U.S.C. 4511(c).

[4] The proposed rule included a discussion of its origin in the Uniform Rules. *See* 75 FR 49314, 49316–17.

[5] Public Law 89–554, 80 Stat. 381 (1966) (codified at 5 U.S.C. 551–559; 701–706). Formal adjudications (*i.e.,* hearings ''on the record'') are governed by chapters 5 and 7 of the APA (5 U.S.C. 554, 556, and 557). The APA grants each agency ''the authority necessary to comply with the requirements of [chapter 5] through the issuance of rules or otherwise.'' *See* 5 U.S.C. 559.

[6] No hearing on the record is required prior to the issuance of an order under section 1377(h) of the Safety and Soundness Act (12 U.S.C. 4636a(h)), for the suspension or removal of an entity-affiliated party charged with a felony. Once served, the subject may timely submit a written request to appear before the Director to show the continued service would not pose a threat to the interests of the regulated entity or threaten to impair public confidence in the regulated entity. This provision does not authorize or require a formal hearing on the record; therefore, the subpart C provisions of the proposed rule do not govern such proceedings.

1314 of the Safety and Soundness Act (12 U.S.C. 4514).

As proposed, the rule would have replaced the Rules of Practice and Procedure previously adopted by OFHEO (12 CFR part 1780) and the Finance Board (12 CFR part 908).[7] Many of the existing procedures were retained in the proposed rule without significant revisions. The proposed rule set out the requirements for the commencement of an enforcement proceeding by service of a notice of charges; the appointment of a presiding officer; hearing procedures and permissible activities; the conduct of the trial-like testimonial phase of the hearing process; the presiding officer's filing with the Director of a recommended decision and order, along with the hearing record; the decision by the Director; and the qualifications and disciplinary rules for practice before FHFA.[8]

The proposed process was similar to the existing rules in that during the course of the hearing, the presiding officer would control virtually all aspects of the proceeding. In particular, the proposed rule would have established that the presiding officer would determine the hearing schedule; preside over all conferences; rule on non-dispositive motions, discovery, and evidentiary issues; and ensure that the proceeding is prompt, fair, and impartial, and allows for the creation of a written record upon which the recommended decision is based.[9]

The proposed rule retained the existing requirement that the Director issue a final ruling within 90 days of the date on which the Director serves notice upon the parties that the hearing record is complete and the case has been submitted for final decision. The proposed rule similarly would have reserved to the Director the authority to dismiss the proceeding, in whole or in part, or to make a final determination of the merits of the proceeding.

Informed by OFHEO's prior experience in conducting enforcement proceedings under its existing Rules of Practice and Procedure, FHFA identified certain issues for clarification in its revised rule. Accordingly, the proposed rule would have included a definition of ''notice of charges'' to establish the notice of charges as the charging document that is served by FHFA on a regulated entity or party as provided in sections 1371 through 1377 of the Safety and Soundness Act (12 U.S.C. 4631 through 4636a) to initiate enforcement proceedings. Additionally, to avert any future confusion, the proposed rule would have stated in a new definition in § 1209.3 that a ''notice of charges'' is to be distinguished from an ''effective notice'' within the meaning of 12 U.S.C. 4635(a), to more clearly articulate that this provision does not confer upon a Federal district court subject matter jurisdiction over FHFA's administrative enforcement proceeding. That is, although a Federal district court has authority to enforce an effective notice or order that has been issued by FHFA, such a notice is not the same as a notice of charges and the court does not obtain subject matter jurisdiction over an ongoing administrative enforcement proceeding through this provision.

The proposed rule sought to make the presiding officer's authority more explicit in several respects. A principal revision in § 1209.11(b)(1) made explicit the authority of the presiding officer to hold an initial scheduling conference to control the proceedings and set the date for the testimonial phase of the hearing in a scheduling order issued in conjunction with the initial scheduling conference set under § 1209.36 of the proposed rule. As a corollary to the authority of the presiding officer to set the date of the evidentiary hearing in a scheduling order, § 1209.23 of the proposed rule would clarify that the notice of charges is to specify that the testimonial hearing date will be determined when the presiding officer holds the initial scheduling conference and issues a scheduling order within 30 to 60 days of service of the notice of charges.

Additionally, the proposed rule sought to arm the presiding officer with sufficient autonomy to control the pace and focus of discovery to prohibit unnecessary or burdensome discovery. First, § 1209.11(b)(5) of the proposed rule confirmed that the presiding officer has full authority to issue and enforce discovery orders. Second, § 1209.11(b)(8) of the proposed rule was to effectively codify the broad powers of the presiding officer to regulate the scope, timing, and completion of discovery of any non-privileged matter that is materially relevant to the charges or allowable defenses in the proceeding.

Third, the proposed rule made explicit the requirement that matters or documents subject to discovery must be ''materially relevant'' to the charges or allowable defenses in the proceeding. This measure of allowable discovery was stated to support the presiding officer's discretion and enhance his ability to deny discovery requests that seek information having no logical connection to a consequential fact that would tend to prove or to disprove a matter in issue. The proposed rule thus would have included a parallel authority in § 1209.11(b)(11) to underscore that the presiding officer has ample authority to admit, exclude, or limit evidence according to its material relevance to the legally cognizable claims and defenses presented by a notice of charges.

E. Differences

When promulgating any regulation that may have future affect relating to the Banks, the Director is required by section 1201 of HERA to consider the differences between the Banks and the Enterprises with respect to the Banks' cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; and joint and several liability. *See* section 1201 Public Law 110–289, 122 Stat. 2782–83 (*amending* 12 U.S.C. 4513(f)[sic]).[10] As noted in the preamble to the proposed rule, the Director considered the differences between the Banks and the Enterprises, as they relate to the above factors, and determined that the rule is appropriate. *See* 75 FR 49314, 49315. FHFA also requested comments from the public about whether differences related to these factors should have resulted in any revisions to the proposed rule. No comments specific to that request were received. In sum, the five differences identified in section 1201 of HERA do not require a different enforcement regulation for the Banks than for the Enterprises. Therefore, the comparative analysis under section 1201 of HERA undertaken for the proposed rule required no changes.

On the effective date, this final rule will, among other things, repeal and replace the current Finance Board Rules of Practice and Procedure regulation governing formal enforcement proceedings (12 CFR part 908), revised to implement the HERA-amended enforcement scheme.

II. Summary of Comments

FHFA received two comment letters on the proposed rule. In their respective letters the Banks and the trade associations commented on more than two dozen provisions and noted a number of broader issues presented in the proposed rule. Those broader issues centered on: whether the evidentiary standard stated in the rule is comparable to that of the Uniform Rules; whether the rule may apply to

[7] *See* 75 FR 49314, 49317, n. 17, 18.

[8] *See* id. at n. 19.

[9] *See* id. at n. 20.

[10] So in original; no paragraphs (d) and (e) were enacted. *See* 12 U.S.C.A. 4513 n 1.

enforcement of housing goals; whether some of the procedures may provide FHFA with a tactical advantage over the responding party; whether the rule is intended to apply to investigative subpoenas; whether the provisions on district court jurisdiction should be clarified; whether the rule should be revisited to impose the standards of conduct for parties appearing before the Director on agency employees, and whether the rule should impose on agency staff and the presiding officer a confidentiality requirement under the Trade Secrets Act. These issues are addressed in turn below.

Evidentiary Standard

One commenter queried whether the evidentiary standard expressed in the proposed rule strays from the model Uniform Rules. FHFA has considered the comment and concluded that the rule does not depart from the evidentiary standard for discovery in enforcement hearings embodied in the Uniform Rules. Indeed, it is fully consistent with the Federal Deposit Insurance Corporation's rule that allows discovery of ''any matter, not privileged, that has material relevance to the merits of the pending action.'' 12 CFR 308.24(b). This rule adopts a similar standard that the evidence must be materially relevant to the charges or allowable defenses presented in the action. The ''materially relevant'' standard ensures that the information to be introduced for the record will have a logical connection to a consequential fact that tends to prove or disprove a matter in issue.

The discovery requirement was made more explicit also to underscore that in an administrative enforcement hearing the presiding officer must have authority to frame the issues, control the pace of the proceedings, and to admit, exclude or limit evidence according to its materiality, relevance, and analytical usefulness in the context of the claims and available defenses. This standard for discovery matters is fully consistent with the APA requirement for formal administrative hearings that an agency ''as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitive evidence.'' *See* 5 U.S.C. 556(d). Moreover, it fosters conclusions based on a hearing record that comprises ''reliable, probative, and substantial evidence.'' *See id.* It is, therefore, essential for evidentiary probity to make express this clear standard in order to promote the fair resolution of issues in an equitable and timely fashion, and for the conservation of the resources of the presiding officer. This issue also is discussed below in response to a comment on § 1209.11(b) of the proposed rule.

Enforcement of Enterprise Housing Goals

The grounds and remedies for cease and desist enforcement proceedings relative to Enterprise housing goals (exclusive of the requirements pertaining to underserved markets) in 12 U.S.C. 4581 differ from those for cease and desist enforcement proceedings under 12 U.S.C. 4631, but the hearing process called for in 12 U.S.C. 4582 for enforcement of housing goals is essentially identical to the hearing procedure requirements set out in 12 U.S.C. 4633. Therefore, the proposed rule allowed that in the future the hearing procedures in subpart C of the proposed rule might be utilized for housing goals enforcement hearings.

One commenter opined that application of the hearing procedures in subpart C of the proposed rule to Enterprise housing goals enforcement proceedings ''appears sensible,'' but recommended that FHFA should be clear about which subpoena authority would be used in such actions because the subpoena authority in 12 U.S.C. 4588 differs in certain respects. For example, the treatment of witness fees in 12 U.S.C. 4588 has provisions not found in the subpoena authority in 12 U.S.C. 4641. Moreover, following the HERA amendments, 12 U.S.C. 4641 applies to administrative enforcement actions, examinations, and investigations. *Compare* 12 U.S.C. 4588 *with* 12 U.S.C. 4641. Without presaging every possible scenario, 12 U.S.C. 4588, the subpoena authority for housing goals administrative enforcement proceedings under 12 U.S.C. 4581, appears to be controlling in such actions. Without more information, specific guidance on such issues in advance of potential future rulemakings would be premature.

Tactical Advantages

One commenter questioned whether certain provisions of the proposed rule provided for symmetrical treatment of parties or their counsel in an enforcement action, in particular with respect to the filing of documents under seal (§ 1209.12(c)), requesting a closed hearing (§ 1209.12(d)), and authority to sanction counsel for *ex parte* contact of decisional employees (§§ 1209.14 and 1209.70). These sections are not unfairly weighted in favor of FHFA counsel of record. First, whether a proceeding should be open to the public or a document should be filed under seal is vested exclusively in the agency by the statutory authority reserved to the Director to determine if disclosure would be contrary to the public interest. Therefore, to file a document under seal, FHFA counsel of record must make a written determination that disclosure of the document would be contrary to the public interest; at the same time the presiding officer is authorized to issue orders or close hearings in whole or in part to ensure the confidentiality of the material is preserved. Thus, the proposed rule would have entrusted to the presiding officer the responsibility to maintain the confidentiality of information. These standards are consistent with due process and the Uniform Rules. Furthermore, all parties' rights to protect confidential information are preserved because any party to a proceeding may request confidential treatment of information, such as personal financial information, in the form of a protective order.

Second, the standards set forth in Subpart D governing representational conduct before the agency are to promote the expeditious, fair resolution of adjudications or matters defined as ''practice before FHFA,'' including enforcement proceedings. FHFA counsel of record appearing before the presiding officer in an enforcement proceeding would of course be subject to these requirements. In addition, FHFA employees are held to standards of conduct and ethical requirements that are set forth and redressed under Title 5 of the United States Code. The procedures in subpart C of the proposed rule would not govern such matters. Notwithstanding the express authority of the presiding officer to take remedial action or sanction a party or representative for prohibited acts in a proceeding, the overall authority of the presiding officer and Director to take action or impose restrictions or sanctions authorized under applicable statute or regulations is preserved by § 1209.74(c)(4).

Investigative Subpoenas

One commenter asked for clarification on whether the proposed rule is intended to govern investigatory subpoenas. The commenter attributed the confusion, in part, to the fact that 12 U.S.C. 4641 contains authority for the issuance of subpoenas in examinations and investigations, in addition to adjudications. To be clear, 12 U.S.C. 4641 is included in the citation as support for the rule because it contains the authority for adjudicative subpoenas; there was no intention to suggest the proposed rule for enforcement proceedings would apply to investigations or examinations. The commenter posited that the proposed

rule would not apply to examinations or investigations because: (1) FHFA has authority to issue (only) two types of subpoenas, investigative and adjudicatory; and (2) routine examinations generally would not involve the issuance of subpoenas, and if the subpoena authority is exercised ''it is commonly called a formal investigation.'' FHFA has considered these comments, and notes that express examination subpoena power is established by the HERA amendments in 12 U.S.C. 4641. In addition, FHFA agrees with the conclusion that the proposed rule does not establish a process for formal investigations, and thus further clarification would be unnecessary. Finally, by law, FHFA as conservator or receiver may issue subpoenas pursuant to 12 U.S.C. 4617(b)(2)(I). Therefore, FHFA has determined that no changes to the proposed rule are required.

Judicial Enforcement of Administrative Subpoenas

One commenter recommended removal of the last sentence in the provision that governs discovery of parties, § 1209.30(h)(2), which states that the jurisdiction of district courts to enforce administrative subpoenas is as provided by 12 U.S.C. 4641(c)(2). Specifically, the proposed rule would have added a new sentence citing the limitations on district court jurisdiction that are found in 12 U.S.C. 4635(b), to underscore that a district court when called upon to enforce an administrative subpoena does not obtain subject matter jurisdiction over the administrative enforcement action.[11] In sum, the statute makes express that the district court's jurisdiction is limited to determining whether the subpoena is legally enforceable and to order compliance. But because no corollary sentence was added to the section on discovery of nonparties in § 1209.31, FHFA has deleted the last sentence in § 1209.30(h)(2) from the final rule to avoid any potential for confusion.

Sanctions

One commenter objected that the proposed rule would permit dissimilar treatment of agency counsel for prohibited conduct and requested that agency counsel should be expressly barred from engaging in *ex parte* communications and from conferring with decisional staff on settlement offers. Additionally, the commenter recommended that the presiding officer should have express authority under the subpart D provisions to sanction agency counsel for prohibited conduct. *Ex parte* communications are prohibited in § 1209.14 of the proposed rule. The commenter objected that the proposed rule fails to act as a deterrent to both parties, because it does not expressly subject agency counsel to the sanctions applicable to prohibited communications.

Contrary to the commenter's assertion, the rule anticipates that agency counsel would refrain from improper conduct and *ex parte* communications with the presiding officer. Any party or representative appearing in an administrative enforcement hearing, including FHFA counsel of record, is subject to the bar on *ex parte* communications and the corresponding authority of the presiding officer. Nevertheless, the rule does allow for the agency head to be briefed on matters that may relate to settlement issues and complex supervisory or regulatory matters by those employees who best know the subject matter, even if the subject matter bears on the proceeding. FHFA does not agree that, in such situations FHFA counsel of record should be so prohibited and subject to disciplinary action. Where the Director must rely on the expertise of agency staff, the Director should not be denied advice of counsel. For these reasons, FHFA declines to revise the final rule.

Trade Secrets Act Reminder

One commenter remarked that more protections for confidential information should be afforded where discovery requests often may seek the production of confidential financial or other proprietary materials from parties and nonparties. The commenter notes that the Trade Secrets Act prohibits Federal employees from divulging trade secrets obtained in the course of their Federal employment, and notwithstanding the precautions taken by FHFA employees, the rule should contain a reminder of these prohibitions. Neither the Uniform Rules nor the current respective agency Rules of Practice and Procedure include a reference to the Trade Secrets Act. Several factors dictate against adding a specific reference to the Trade Secrets Act in the final rule.

First, the Trade Secrets Act prohibits officers and employees of Federal agencies from publishing or disclosing trade secrets and other confidential business information ''to any extent not authorized by law.'' This prohibition on the public disclosure of trade secrets material unquestionably applies to FHFA employees. Following a 1992 amendment, the Trade Secrets Act also applied to ''any person acting on behalf the Office of Federal Housing Enterprise Oversight.'' (*See* Public Law 102–550, Title. XIII, § 1353, 106 Stat. at 3970). Thereafter, section 1161(d) of HERA substituted FHFA for OFHEO in this provision. Thus, FHFA's employees, contractors and agents are subject to criminal penalties for the unauthorized public disclosure of trade secrets material.

Second, existing regulations govern the disclosure of confidential or proprietary information, even where the Trade Secrets Act would not bar disclosure. *See* 12 CFR part 1703. In short, the regulations currently in effect prohibit agency employees from disclosing or permitting the disclosure of unpublished FHFA information absent authorization of the Director. Any person or entity that releases, discloses, or uses any unpublished information, except as expressly authorized, may be subject to the penalties provided in 18 U.S.C. 641 and other applicable laws. A current FHFA employee also may be subject to administrative or disciplinary proceedings under existing OFHEO and Finance Board regulations that remain in effect until FHFA issues a comprehensive regulation.

Third, apart from the Trade Secrets Act and FHFA's information disclosure regulation(s), there are provisions in the Rules of Practice and Procedure sufficient to ensure that sensitive, confidential materials will not be inadvertently disclosed in the course of an enforcement hearing. The rule as proposed includes these safeguards for the protection of confidential financial and trade secrets information. For example, a party (or non-party) who provides discovery materials that are considered confidential may apply for a protective order to preserve the confidentiality of the information. In addition, FHFA counsel of record may file or require the filing of a document under seal if he or she provides a written determination that disclosure of the document or portion of the document would be contrary to the public interest in accordance with § 1209.12(c) of the proposed rule. Moreover, a respondent may move for a closed hearing under § 1209.12(b); the presiding officer then forwards a recommended decision to the Director

[11] 12 U.S.C. 4635(b) provides in pertinent part: ''Except as otherwise provided in this subchapter and sections 4619 and 4623 of this title, no court shall have jurisdiction to affect, by injunction or otherwise, the issuance or enforcement of any notice or order under section 4631, 4632, 4513b, 4636 or 4637 of this title, or subchapter II of this chapter, or to review, modify, suspend, terminate, or set aside any such notice or order.'' Public Law 102–550, Title XIII, § 1375, Oct. 28, 1992, 106 Stat. 3990; Public Law 110–289, Div. A, Title I, § 1154, 122 Stat. 2775, July 30, 2008.

for his determination. And, the proceeding itself may be closed to entertain the introduction of sealed materials under § 1209.12(c). FHFA finds that there are sufficient safeguards in the rule for the protection of materials characterized as trade secrets.

Finally, the Safety and Soundness Act authorizes the Director to make disclosures that are, in his or her exclusive discretion, in the best interest of the public. For example, the Director has the authority to determine that information sharing with other Federal agencies is appropriate where it is necessary for the performance of official duties, and to determine when it is in the public interest to make information public. Therefore, FHFA concludes that it is not necessary to add a specific reference to the Trade Secrets Act in the final rule.

Specific Provisions

The commenters also raised points relating to specific provisions of the proposed rule. To the extent that FHFA either adopts revisions in the final rule in response to those comments or declines to adopt comments on the proposed rule, those matters are addressed below as part of the discussion of those sections in the final rule. Sections of the proposed rule that raised no issues or received no comments are to be adopted in the final rule as proposed.

III. Final Rule

A. General

The proposed rule would have adopted many provisions of the Finance Board's and OFHEO's enforcement rules, which are nearly identical procedurally, without substantive changes, to be codified in a new part 1209 that would supersede the existing OFHEO and Finance Board Rules of Practice and Procedure. In the final rule, FHFA is adopting most of those provisions of the proposed rule without any further substantive changes. Thus, most of the provisions of the final rule that are located in Subpart A (Scope and Authority), Subpart B (Enforcement Proceedings under sections 1371 through 1379D of the Safety and Soundness Act), Subpart C (Rules of Practice and Procedure), Subpart D (Parties and Representational Practice before the Federal Housing Finance Agency; Standards of Conduct), Subpart E (Civil Money Penalty Inflation Adjustments), and Subpart F (Suspension or Removal of Entity-Affiliated Party Charged with Felony), are unchanged from the proposed rule. Described separately below are all instances where FHFA adopts or declines to adopt revisions in response to comments on specific sections in the proposed rule.

B. Subpart A—Scope and Authority

Section 1209.3—Definitions

The proposed rule would have carried over into § 1209.3, without substantive edits, nearly all of the existing definitions from the OFHEO and Finance Board regulations that are applicable to regulations in this part, but would have revised certain definitions and added a number of new definitions to implement the statutory amendments or provide greater clarity. Except as described below, the final rule adopts the definitions from the proposed rule without further change.

The proposed rule included a new definition of ''associated with the regulated entity,'' to address the HERA amendments in section 1379 of the Safety and Soundness Act that established a six-year ''look-back'' period and expanded the scope of the parties subject to FHFA enforcement jurisdiction. (*See* 12 U.S.C. 4637). In particular, the law provides that the Director may issue a notice and proceed ''against any such entity-affiliated party, if such notice is served before the end of the six-year period beginning on the date such entity-affiliated party ceases to be associated with the regulated entity.'' *See id.* The proposed rule would have included a definition of ''associated with the regulated entity'' to provide descriptive guidance as to the type of activities meant by the phrase ''associated with.'' One commenter opined that ''associated with the regulated entity'' appears to be broader than ''entity-affiliated party,'' and does not appear elsewhere in the proposed rule. That commenter suggested that the six-year period should begin ''on the date such entity-affiliated party would no longer be deemed to be an entity-affiliated party.''

FHFA disagrees with this suggestion. First, section 1379 of the Safety and Soundness Act statute was amended precisely for that reason—to hold a wider class of persons accountable for their actions under the Safety and Soundness Act. Under HERA, the revised provision reads: ''The resignation, termination of employment or participation, or separation of an entity-affiliated party,'' whereas prior to HERA it read: ''Director or executive officer of an enterprise.'' Second, the suggested language falls short of setting a hard deadline. Because it is too subjective, it may actually extend the reach of the look-back further than Congress intended. Third, by conflating ''entity-affiliated party'' with ''associated with,'' the provision would read: When an entity-affiliated party ceases to be an entity-affiliated party. Such a reading would strip the phrase of any logical meaning and dilute the prerequisite. Therefore, the final rule adopts the definition as proposed.

C. Subpart B–Enforcement Proceedings Under Sections 1371 Through 1379D of the Safety and Soundness Act

Section 1209.4—Scope and Authority

This section states the authority for administrative enforcement proceedings in accordance with sections 1371 through 1379D of the Safety and Soundness Act (12 U.S.C. 4631 through 4641), which under section 1373 of the Safety and Soundness Act (12 U.S.C. 4633) must be held on the record, as follows: (1) Cease and desist and temporary cease and desist proceedings under sections 1371 through 1372 of the Safety and Soundness Act (12 U.S.C. 4631 through 4633); (2) civil money penalty assessment proceedings under section 1376 of the Safety and Soundness Act (12 U.S.C. 4636); and (3) the removal and prohibition proceedings under section 1377 of the Safety and Soundness Act (12 U.S.C. 4636a) (except proceedings under section 1377(h) of the Safety and Soundness Act for the suspension or removal of an entity-affiliated party charged with a felony (12 U.S.C. 4636a(h)).

Additionally, it reiterates that, pursuant to sections 1336(c) and 1371(a)(2) of the Safety and Soundness Act (12 U.S.C. 4566(c) and 12 U.S.C. 4631(a)(2)), actions to enforce housing goals must proceed under sections 1341 and 1345 of the Safety and Soundness Act. *See* 12 U.S.C. 4581, 4585.[12] It is necessary to make this distinction clear because the grounds for initiating cease and desist proceedings relative to housing goals under 12 U.S.C. 4581 differ from the cease and desist powers under 12 U.S.C. 4631. Similarly, the civil money penalties for housing goals violations differ from the civil money penalty provisions in 12 U.S.C. 4636. *See* 12 U.S.C. 4585. The process for

[12] Section 1371(a)(2) of the Safety and Soundness Act (12 U.S.C. 4631(a)(2)) states in pertinent part that the Director may not proceed under that section to ''enforce compliance with any housing goal established under [sections 1331 through 1348 of the Safety and Soundness Act], with section 1336 or 1337 of this title, with subsection (m) or (n) of section 309 [of Fannie Mae's authorizing statute] (12 U.S.C. 1723a(m), (n)), with subsection (e) or (f) of section 307 [of Freddie Mac's authorizing statute] (12 U.S.C. 1456(e), (f)), or with paragraph (5) of section 10(j) of the Federal Home Loan Bank Act (12 U.S.C. 1430(j)).''

conducting housing goals enforcement actions, however, is indistinguishable—a notice of charges is served and a hearing is conducted on the record. *See* 12 U.S.C. 4582(a)(1)). For that reason, the formal hearing procedures set out in subpart C of part 1209 as proposed are well-suited to govern housing goals enforcement proceedings. One commenter offered that combining the hearing procedures appeared sensible. FHFA has concluded that promoting use of the subpart C procedures for housing goals enforcement proceedings supports both an economies of scale approach to regulation, and provides certainty with respect to the process. Therefore, the provision is to be adopted in final as proposed.

Section 1209.5—Cease and Desist Proceedings

Section 1209.5 of the proposed rule closely followed the requirements of section 1371 of the Safety and Soundness Act (12 U.S.C. 4631). That statutory provision, as amended by section 1151 of HERA, sets out the authority and establishes several requirements for cease and desist enforcement proceedings. In the final rule, FHFA has retained the language of the proposed rule regarding the general requirements, but has also made certain revisions in response to the comments. In particular, § 1209.5(a)(1)(i) in the final rule has been edited to state more specifically the requisite conditions of section 1371(a)(1) of the Safety and Soundness Act (12 U.S.C. 4631(a)(1)). Additionally, § 1209.5(a)(i) has been edited lightly to underscore that the cease and desist/civil money penalty provisions set out in sections 1371 and 1376 of the Safety and Soundness Act (12 U.S.C. 4631, 4636) are not to be applied to the enforcement of housing goals. Also in response to a comment, § 1209.5(a)(2) in the final rule has been revised to state more expressly the discretion and authority of the Director to deem a regulated entity to be engaging in an unsafe or unsound practice on the basis of a less than satisfactory rating in its most recent report of examination with respect to asset quality, management, earnings, or liquidity, where the Director finds that the deficiency has not been corrected.

Section 1209.5 of the proposed rule summarizes the statutory cease and desist authority under section 1371 of the Safety and Soundness Act (12 U.S.C. 4631), which provides in section 1371(f) of the Safety and Soundness Act (12 U.S.C. 4631(f)) that a cease and desist order shall remain effective and enforceable as provided in the order, except to the extent that the order is stayed, modified, terminated, or set aside by the Director or otherwise as provided under the Safety and Soundness Act. One commenter recommended revising § 1209.5 of the proposed rule to include a reference to the availability of judicial review to make it consistent with §§ 1209.6(d) and 1209.7(d) in the proposed rule. This suggestion, which is misplaced in one respect, has merit for another reason: To reinforce that section 1374 of the Safety and Soundness Act (12 U.S.C. 4634) governs judicial review of a final cease and desist order. Section 1209.5 of the final rule is being revised to add a new paragraph (d)(2), to state that judicial review is governed by section 1374 of the Safety and Soundness Act (12 U.S.C. 4634), as provided for in section 1371(f) of the Safety and Soundness Act (12 U.S.C. 4631(f)).

FHFA notes that this revision to § 1209.5(d) of the final rule is not made for the purpose of consistency with § 1209.6(d) of the rule, as the commenter posited. In fact, § 1209.6(d) refers to an entirely different judicial authority: The authority of a district court to issue an injunction to set aside, limit, or suspend the enforcement of a temporary cease and desist order pending the completion of administrative proceedings on a notice of charges under section 1372(d) of the Safety and Soundness Act (12 U.S.C. 4632(d)). Section 1376(c)(3) of the Safety and Soundness Act (12 U.S.C. 4636(c)(3)) makes clear that a district court does not have jurisdiction to review a final order imposing a civil money penalty: The order of the Director imposing a penalty under this section shall not be subject to review, except as provided in section 1374 of the Safety and Soundness Act (12 U.S.C. 4634), which vests exclusive jurisdiction in the United States Court of Appeals for the District of Columbia to review any final order issued under sections 1313B, 1371, 1376, or 1377 of the Safety and Soundness Act (12 U.S.C. 4513b, 4631, 4636, 4636a). In fact, section 1376(d) of the Safety and Soundness Act expressly bars a district court from putting at issue the validity and appropriateness of a civil money penalty order in an action under this subsection to enforce a civil money penalty by obtaining a monetary judgment in district court. *See* 12 U.S.C. 4636(d).

For additional clarity, minor edits also have been made to §§ 1209.55(c), 1209.56, and 1209.57 in the final rule to underscore the authority of the Director to modify, terminate, or set aside an order as provided by section 1373(b)(2) of the Safety and Soundness Act (12 U.S.C. 4633(b)(2)), to require a party to exhaust administrative remedies as a precondition to judicial review of any final decision and order, and to state that judicial review of a final order is available in accordance with section 1374 of the Safety and Soundness Act (12 U.S.C. 4634).

Section 1209.6—Temporary Cease and Desist Orders

Section 1209.6 of the proposed rule implements section 1372(a) of the Safety and Soundness Act (12 U.S.C. 4632(a)) governing the issuance of a temporary cease and desist order. Section 1372(a) provides that, in connection with a notice of charges served under section 1371(a) or (b) of the Safety and Soundness Act, if the Director determines that the actions specified in the notice of charges served upon a regulated entity or any entity-affiliated party, or the continuation thereof, are likely to cause insolvency or significant dissipation of assets or earnings of that entity, or to weaken the condition of that entity prior to the completion of the proceedings conducted pursuant to sections 1371 and 1373 of the Safety and Soundness Act (12 U.S.C. 4631, 4633), the Director may issue a temporary order requiring the regulated entity or entity-affiliated party to cease and desist from any such violation or practice, and take affirmative action to prevent or remedy such insolvency, dissipation, condition, or prejudice pending completion of the cease and desist proceedings.

One commenter suggested that §§ 1209.6 and 1209.7 of the proposed rule should ''specify that the notice of charges in a civil money penalty proceeding must conform with § 1209.23,'' and incorporate parallels to §§ 1209.5(a)(1) and 1209.8(a)(1). FHFA agrees that a notice in a civil money penalty action must provide the same type of information as required of a notice of charges. Accordingly, § 1209.7 will be revised in the final rule to specify that the notice in a civil money penalty action must provide the same information as required of a notice of charges and conform to the requirements of § 1209.23. No changes to § 1209.6 are contemplated because the operative notice of charges in a temporary cease and desist proceeding would be subject to § 1209.5, which, as stated, requires conformity with the requirements of § 1209.23.

Section 1209.7—Civil Money Penalties

Section 1209.7 of the proposed rule implemented the provisions of section 1376 of the Safety and Soundness Act that govern civil money penalty

enforcement proceedings under the Safety and Soundness Act. *See* 12 U.S.C. 4636(a). For the commencement of such proceedings section 1376(c) of the Safety and Soundness Act requires the Director to establish standards and procedures that, among other things, provide for the Director to notify the regulated entity or entity-affiliated party in writing of the Director's determination to impose a penalty. A hearing on the record under section 1373 of the Safety and Soundness Act is required. One commenter suggested that the proposed rule should be revised to specify that the notice should comply with the requirements of § 1209.23 of the proposed rule that dictates the content of a notice of charges in order to bring the civil money penalty notice in parallel with a notice of charges issued under the cease and desist or a notice issued under the removal and prohibition provisions.

The suggestion has merit. Like a notice of charges issued under section 1371(c)(1) of the Safety and Soundness Act (12 U.S.C. 4631(c)(1)), or a notice of intention to remove or suspend a party under section 1377(c)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(a)), a notice of intent to impose a civil money penalty under section 1376 of the Safety and Soundness Act (12 U.S.C. 4636) should contain a statement of facts constituting grounds for such an action, and fix a time and place for the hearing. Under applicable law, each of these pleadings must give sufficient notice of the facts and authority underlying the respective proceeding, and § 1209.23 was drafted with that premise in mind. Therefore, FHFA has determined to edit § 1209.7(a)(1) in the final rule to require that such notices shall conform to § 1209.23.

One commenter noted that § 1209.7(a)(2) of the proposed rule omits a reference to the daily penalty cap. The proposed rule cited to but did not recite the statutory authority for Tier I violations that includes that reference. FHFA agrees that for the sake of clarity § 1209.7(a)(2) in the final rule should be revised to include that reference.

Section 1209.8—Removal and Suspension Proceedings

The statutory authority and requirements for removal and suspension enforcement proceedings are set forth in section 1377 of the Safety and Soundness Act (12 U.S.C. 4636a). The removal or suspension of an entity-affiliated party, or the officers, directors, or management of the Office of Finance, a joint office of the Banks— where the requisite conditions are met—is initiated by service of a notice, and a hearing on the record is held to determine whether the grounds are satisfied, as provided by section 1373(a)(1) of the Safety and Soundness Act (12 U.S.C. 4633(a)(1)). In particular, section 1377(a)(1) of the Safety and Soundness Act authorized the Director to serve upon a party described in paragraph (a)(2) of the section, or any officer, director, or management of the Office of Finance, written notice of the intention of the Director to suspend or remove such party from office, or prohibit any further participation by such party, in any manner, in the conduct of the affairs of a regulated entity. *See* 12 U.S.C. 4636a(a)(1).

Section 1209.8(a)(1) of the proposed rule was drafted to implement 12 U.S.C. 4636a(a)(1). One commenter noted that §§ 1209.8(a)(1) and (c)(1) may present confusing redundancies by repeating the requirement for notices to conform to § 1209.23. To avoid any potential confusion FHFA has determined to remove the reference to § 1209.23 from § 1209.8(a)(1) in the final rule. Section 1209.8(c)(1) will be adopted in the final rule as proposed.

Section 1209.8(b) of the proposed rule was drafted to implement section 1377(b) of the Safety and Soundness Act (12 U.S.C. 4636a(b)). Section 1377(b)(2)(B) of the Safety and Soundness Act (12 U.S.C. 4636a(b)(2)(B)) provides that unless stayed by a court under paragraph (g) of section 1377 of the Safety and Soundness Act (12 U.S.C. 4636a(g)), any suspension order issued under paragraph (b) shall remain in effect and enforceable until the Director dismisses the charges set out in the notice served under paragraph (a)(1) of this section or the effective date of the order issued under paragraph (b) [sic].[13] This is a drafting error in the statute; the reference should be to paragraph (c) of section 1377. *See* 12 U.S.C. 4636a(b)(2)(B)(ii)).

Noting this technical error, one commenter posited that § 1209.8 of the proposed rule, which refers to the applicable provision, ''leaves unclear the distinction between an immediate suspension/prohibition order issued pursuant to § 1209.8(b) and a final suspension/prohibition order issued pursuant to § 1209.8(c).'' To give the statute logical meaning the commenter would make an explicit reference to paragraph (c) in § 1209.8(b)(2) of the final rule to specify ''that the effective period of a suspension order issued under § 1209.8(b) commences upon service and unless a court issues a stay, remains effective until the Director either dismisses the charges, or pursuant to § 1209.8(c), the Director issues a final order.'' FHFA agrees that the intent of the law is that an order issued under section 1377(b) of the Safety and Soundness Act (12 U.S.C. 4636a(b)) is effective immediately upon service and, absent a court-ordered stay, remains in effect and enforceable until the Director dismisses the charges or the effective date of an order issued under section 1377(c) of the Safety and Soundness Act. *See* 12 U.S.C. 4636a(b)(2). Accordingly, to more specifically convey the intent of the law, § 1209.8(b)(2) (effective period) in the final rule has been revised to that effect.

Section 1209.8(d)(3) of the proposed rule was written to implement the provisions of section 1377(e) of the Safety and Soundness Act (12 U.S.C. 4636a(e)) that impose industry-wide restrictions on anyone who has been removed or suspended from office (or barred from participating in the affairs of a regulated entity or the Office of Finance), absent the written consent of the Director in accordance with section 1377(e)(2) of the Safety and Soundness Act (12 U.S.C. 4636a(e)(2)). Such consent is committed to the discretion of the Director by law. The provision is silent on any process or procedures for obtaining that written consent, other than to require that the consent be publicly disclosed.

One commenter suggested that § 1209.8(d)(3)(ii) of the proposed rule was inadvertent in stating that the Director's refusal to consent shall not be a final agency action, because that effectively would bar access to judicial review. In truth, the draft rule provision is not a mistake, and FHFA disagrees with the premise of the commenter's suggestion because there is no provision for judicial review. Section 1377(e) of the Safety and Soundness Act (12 U.S.C. 4636a(e)) does not provide for judicial review of the Director's decision whether to permit a person subject to a removal or suspension order to continue, resume, or undertake participation in the affairs of a regulated entity or the Office of Finance. In fact, section 1377 of the Safety and Soundness Act provides only two judicial remedies. First, for orders issued under section 1377(b) of the Safety and Soundness Act, the subject may pursue a stay of the order through an action in district court under section 1377(g) of the Safety and Soundness Act (12 U.S.C. 4636a(b), (g)). Second, a final suspension/removal/prohibition order issued under section 1377(c) of the Safety and Soundness Act (12 U.S.C.

[13] The reference should be to section 1377(c) of the Safety and Soundness Act (12 U.S.C. 4636a(c)), which concerns final orders.

4636a(c)) is subject to judicial review in the court of appeals in accordance with section 1374 of the Safety and Soundness Act (12 U.S.C. 4634). Third, the public purpose of the industry-wide prohibition set out in section 1377(e)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(e)(1)), taken together with the prohibitions on certain specified activities in section 1377(d) of the Safety and Soundness Act (12 U.S.C. 4636a(d)), must be given weight. Fourth, the decision whether to permit an entity-affiliated party to participate in the affairs of a regulated entity or the Office of Finance is committed to the discretion of the Director by law. Fifth, under the general precepts of statutory construction, where a provision (such as the right of judicial review) is included in one portion of an act, but excluded in other sections, implying a legislative intent to include the missing provision where it is omitted is unsupported.[14]

Moreover, in the context of a final order under section 1377(c) of the Safety and Soundness Act (12 U.S.C. 4636a(c)), where a court of appeals has already ruled on the appropriateness of a final order, the subject should not then be permitted to seek district court review of the Director's refusal to consent to the subject's proposed participation in a regulated entity or the Office of Finance. The statute includes no such provision of jurisdiction, and to read in such a right potentially would allow a subject to circumvent a final order. As stated, district court jurisdiction is limited by section 1377(g) of the Safety and Soundness Act (12 U.S.C. 4636a(g)) to ordering a stay of a suspension or prohibition order pending the completion of an administrative hearing under section 1377(c) of the Safety and Soundness Act (12 U.S.C. 4636a(c)). Finally, to upend the finality of a final order issued under section 1377(c) of the Safety and Soundness Act (12 U.S.C. 4636a(c)), that was affirmed by the appellate court, would run contrary to the statutory intent to let the Director exercise his advanced knowledge of the Enterprises, the Banks, and the Office of Finance to determine what is in the best interests of these entities. Therefore, having considered the issues, FHFA declines to remove the word ''not'' from § 1209.8(d)(3)(ii) in the final rule as was suggested by the commenter.

[14] *See generally,* Singer, N., Statutes and Statutory Construction (Sixth Ed.), § 67:9.

D. Subpart C—Rules of Practice and Procedure for Hearings on the Record

Section 1209.11—Authority of the Presiding Officer

This section states that hearings are to be held in accordance with the APA, and provides that the presiding officer is to have complete charge of the proceedings, to act in a fair and impartial manner, and to ensure that a full and complete record of the proceeding is made. The powers of the presiding officer to control proceedings are specified. Several commenters noted that § 1209.11(b)(11) of the proposed rule provides that the presiding officer may receive ''materially relevant'' evidence, and characterized this as a stricter evidentiary standard than is provided for in the Uniform Rules. One commenter suggested that this could create uncertainty and disparity in the administrative process, ultimately resulting in unnecessary judicial review of the standard.

In fact, to ensure that the record is complete and accurate, the presiding officer has broad authority under the proposed rule to take all lawful actions necessary to regulate the scope, timing, and completion of discovery of any non-privileged matter that is materially relevant to the charges or allowable defenses; rule upon the admissibility of evidence, and exclude or limit evidence; regulate the course of the testimonial phase of the hearing; examine witnesses; and, upon motion of a party, take judicial notice of a fact. (*See* § 1209.11(b)).

FHFA has considered the comment and concludes that it misconstrues the standard embodied in the Uniform Rules. Section 1209.11(b) of the proposed rule reflects the analogous provisions in the Uniform Rules; and, while it may be an extension of the standard, it does not create a disparity. For example, the Uniform Rules of the Federal Deposit Insurance Corporation (12 CFR part 308, Subpart A) (FDIC rule) provide that the powers of the administrative law judge include the power ''to receive relevant evidence * * *'' (12 CFR 308.5(b)(3)). And relevance is more specifically defined in the discovery rule governing relevance that limits discovery to ''any matter not privileged that has material relevance to the merits of the pending action.'' (12 CFR 308.25(a), (b)). The proposed rule would adopt the same standard. It is necessary and appropriate to expect that evidence have a logical connection to a consequential fact that tends to prove or disprove a matter in issue relative to the charges or allowable defenses in the pending action. This is to enable the presiding officer to ensure that the case is not sidetracked by unnecessary discovery, that discovery is focused on the salient issues, and that an accurate, thorough administrative record is timely created. Accordingly, FHFA declines to revise this provision in the final rule.

Section 1209.12—Public Hearings; Closed Hearings

Generally, appearance hearings are to be open to the public. But this section also reflects the authority of the Director, under section 1379B(b) of the Safety and Soundness Act (12 U.S.C. 4639(b)), to determine that holding an open hearing would be contrary to the public interest, and provides appropriate mechanisms for making and implementing such determinations. Section 1209.12(c) of the proposed rule reserves to FHFA counsel of record the authority to file documents under seal, or to require that a document be filed under seal, upon a written determination that the disclosure of the document would be contrary to the public interest. Furthermore, the presiding officer must preserve the confidentiality of the document and, if needed, issue a protective order that is acceptable to FHFA counsel of record. If a hearing is to be closed for the purpose of introducing testimony or documents filed under seal, certain procedures for handling confidential information are to be followed.

One commenter objected to this process arguing that the rule should provide authority to respondent's counsel to file documents under seal voluntarily to preserve a private (or public) need to protect filings from public disclosure. FHFA has considered the comment and determined that a respondent's right to protect confidential information is procedurally ensured because any party to a proceeding may request confidential treatment of information, such as personal financial information, in the form of a protective order. Therefore, FHFA has determined not to change the provision in the final rule.

One commenter mistakenly cited § 1209.12(d) in objecting to the requirement in § 1209.12(c) of the proposed rule that a protective order issued by the presiding officer to protect the confidentiality of sensitive information should be acceptable to FHFA counsel of record. FHFA sees no inconsistency in this requirement. The Agency has a vital interest in ensuring the confidentiality of sensitive commercial and financial information of the regulated entities. Respondent's counsel would find similar protections

available where a private hearing is authorized. Section 1209.12(b) of the proposed rule permits any party to request a private hearing; the determination is committed to the discretion of the Director, which is consistent with 12 U.S.C. 4639(b), (d). Having considered the issues, FHFA declines to revise § 1209.12(c) in the final rule.

Section 1209.14—Ex Parte Communications

This section defines and prohibits *ex parte* communications, and provides for procedures for dealing with such communications, including sanctions. This section also provides for the separation of functions of Agency personnel. Any employee or agent of FHFA who participated in the examination, investigative, or prosecutorial functions on the case may not participate in or advise in the recommended decision or the Director's decision on the final determination. One commenter objected that analysis of settlement offers and regulatory or supervisory matters are exempt from this prohibition. This reasonable carve out anticipates situations where FHFA counsel of record may be the staff possessed of the detailed knowledge of an issue that could be relied upon to provide context, content, and legal advice to the Director on a supervisory or regulatory matter, or the basis for appropriately resolving an enforcement action.

Section 1209.29—Discovery

Section 1209.29 of the rule provides that the presiding officer is charged with restricting discovery to any matter not privileged that is materially relevant to the charges or allowable defenses in a pending proceeding. One commenter objected to the standard and stated that it differs from the evidentiary standard in the Uniform Rules. The identical concern was raised with respect to § 1209.11(b) of the proposed rule. For the reasons stated in response to the comment on § 1209.11(b), FHFA has determined not to revise these provisions in the final rule. This evidentiary standard is in addition to other measures that are designed to assist the presiding officer in controlling the proceeding, such as a new meet and confer requirement in § 1209.29(a)(2) of the proposed rule that requires the parties to meet and confer in good faith and to submit a discovery plan to the presiding officer for his or her approval.

Discovery is limited to document requests; no other form of discovery is permitted. That is, with the exception of depositions to preserve testimony of a witness unavailable for a hearing (§ 1209.32 of the proposed rule), depositions are prohibited. And, § 1209.29(c) of the proposed rule reiterates that privileged documents are not discoverable. Applicable privileges include: Attorney client, work product, and privileges available to government agencies (*e.g.,* deliberative process; examination; investigative; or any other privileges available under the U.S. Constitution, Federal law, or the principles of Federal common law). To preserve such privileges in productions, a new provision, § 1209.29(d)(1)(ii) of the proposed rule, would have provided that the parties may enter into so-called ''claw back'' agreements, and that the presiding officer shall enter an order to ensure the enforceability of such agreements. One commenter suggested the provision be revised to permit the presiding officer to order claw back procedures where parties did not reach such an agreement prior to production. As proposed, however, the section allows any party to petition the presiding officer to issue claw back procedures, which should address the commenter's concern. FHFA has considered the issue and determined not to revise this section in the final rule.

Section 1209.30—Request for Document Discovery From Parties

This section in the proposed rule would have established the requirements for document discovery from parties, and stated that such discovery must be consistent with the discovery plan approved by the presiding officer under § 1209.29. Among other things, the proposed rule set deadlines for objections to discovery requests or assertion of privilege claims, and addressed the complexities and costs associated with the discovery of electronically-stored information (e-discovery) to encourage transparency and cooperation of the parties to avoid the costly issues commonly encountered in e-discovery.

Under § 1209.30(h) of the proposed rule, pertaining to the enforcement of a document discovery subpoena, the Director or a party who obtained the subpoena may seek enforcement to the extent authorized under section 1379D(c)(1) of the Safety and Soundness Act (12 U.S.C. 4641(c)(1)) by seeking an order from the appropriate United States district court. Section 1209.30(h)(2) of the proposed rule would have dedicated a sentence to state the limitations on a district court's jurisdiction under section 1375(b) of the Safety and Soundness Act (12 U.S.C. 4635(b)). A district court that is reviewing a subpoena does not obtain jurisdiction over the enforcement action itself, because section 1375(b) of the Safety and Soundness Act (12 U.S.C. 4635(b)) provides that a court may not affect by injunction or otherwise the issuance or enforcement of any effective and outstanding notice or order issued by the Director under sections 4513b, 4631, 4632, 4636, and 4637 of Title 12 of the United States Code. The same provision also bars a district court from enjoining or otherwise affecting the issuance or enforcement of an order issued under subchapter II of the Safety and Soundness Act (pertaining to required capital levels, special enforcement powers, and reviews of assets and liabilities), or otherwise to review, modify, suspend, terminate, or set aside any such effective and outstanding notice or order. That is, the jurisdiction of a district court charged with enforcing a subpoena (or declining to do so) would run only to the appropriateness of the subpoena.

Several commenters objected that that sentence in the proposed rule was misleading or overbroad in referring to ''subtitle C of the Safety and Soundness Act,'' and that the provision otherwise appeared to govern discovery of non-parties as well. To resolve any confusion, the commenter recommended that FHFA remove that sentence from § 1209.30(h)(2). In considering the comments, FHFA notes that the jurisdictional bar in section 1375(b) of the Safety and Soundness Act (12 U.S.C. 4635(b)) is set out as a matter of law. To avoid redundancy and foreclose any confusion, FHFA has removed the sentence from the final rule.

Section 1209.31—Document Discovery Subpoenas to Non-Parties

Section 1209.31 of the proposed rule governs document discovery subpoenas to non-parties. The proposed rule would adopt the existing rule with minor changes to headings and the addition of text requiring that the subpoenaing party seek only documents that are materially relevant to the charges and issues presented in the action, state its unequivocal intention to pay for document discovery of a non-party, and serve all other parties with the subpoena. The edits also make clear the discretion of the presiding officer to refuse to issue a subpoena to a non-party where the party's application for the subpoena does not set forth a valid basis of its issuance, or where the request is otherwise objectionable under § 1209.29(b).

One commenter suggested the evidentiary standard be revised to one

of ''general relevance.'' Here, again, the proposed rule specifies a materially relevant standard to keep the Rules of Practice and Procedure aligned with the material and relevant standard adopted by the Federal banking agencies in the Uniform Rules, and to mirror the generally accepted standards of materiality and relevance embodied in Federal law. This standard best takes into account the importance of a transparent discovery process in expeditiously resolving the issues presented by the claims and defenses in a case. FHFA rejects the suggestion that this standard differs from the Uniform Rules, and is issuing this provision in the final rule as proposed.

Section 1209.31(b) of the proposed rule governs motions to quash or modify a document subpoena, and adds a provision to allow a non-party to enter a limited appearance in the proceeding to challenge the subpoena directed to it. The non-party may raise the same types of objections that may be raised by a party under § 1209.30, and within the same time deadlines. The revised provision permits the party seeking the subpoena to respond to the non-party's objections within 10 days of service of a motion to quash or modify. Absent express leave of the presiding officer, no other party may respond to the non-party's motion. Additionally, the pending motion shall not operate as a stay on the proceeding or in any way limit the presiding officer's authority to impose sanctions on a party who induces another to fail to comply with a subpoena. No party may rely on the pendency of a motion to quash or modify to excuse performance of any action required of that party under this part.

One commenter argued that any party should be permitted to object to any subpoena to a non-party for the purpose of asserting that party's rights with respect to the subpoenaed materials, such as the confidentiality of commercial information. FHFA has considered the comment in the context of the overall discovery process and the discretion of the presiding officer to control the proceedings. Additionally, it should be noted that any party may seek a protective order. FHFA is of the view that the mechanisms in place sufficiently protect the rights of parties who may be concerned about the possible disclosure of sensitive or personal information. Therefore, FHFA has determined not to revise the provision in the final rule.

Finally, enforcement of document subpoenas to non-parties also is authorized pursuant to section 1379D(c) of the Safety and Soundness Act (12 U.S.C. 4641(c)). Section 1209.31(c)(2) of the proposed rule provides that there is no automatic stay in the event that a subpoena enforcement action is initiated. In an apparent misreading of the proposed rule, one commenter argued that the presiding officer should have discretion to order a stay. As in § 1209.30(h)(3) of the proposed rule, the provision would allow for a discretionary stay of the proceedings by the presiding officer or the Director for a reasonable period in the interests of the parties or justice. The presiding presumably will ensure that the stay does not interfere with the pace and independence of the enforcement proceeding. This is to ensure the agency process can go forward without delay due to discovery disputes so that the proceedings are not derailed and no hardships are imposed on the parties who seek a speedy adjudication. Therefore, FHFA has determined to promulgate the provision in the final rule as proposed.

E. Subpart D—Parties and Representational Practice Before the Federal Housing Finance Agency; Standards of Conduct

Section 1209.70—Scope

Subpart D of this part contains rules governing practice by parties or their representatives before FHFA in an adjudicatory proceeding and standards of conduct under this part and in any appearance before the Director or any agency representative. This subpart outlines the sanctions that may be prescribed by a presiding officer or the Director against parties or their representatives who fail to conform to the requirements and conduct guidelines; such representation includes, but is not limited to, the practice of attorneys and accountants.

This provision also states that employees of FHFA are not subject to disciplinary proceedings under this subpart, which is a carry-over from the existing enforcement regulations. One commenter mistakenly assumed from this provision that the presiding officer could not sanction agency counsel for violating the rules of practice, but should have discretion to do so. In fact, the presiding officer has exactly that discretionary authority. This provision underscores that employee disciplinary matters proceed under the applicable rules in Title 5 of the United States Code. Disciplinary matters are to be distinguished from conduct that violates the rules of practice for matters before the Director or the presiding officer. If FHFA counsel of record is found to have engaged in prohibited contumacious conduct in the course of an enforcement proceeding, FHFA is of the view that this subpart provides sufficient discretion and guidance for the presiding officer to deal with it, and is adopting the provision in the final rule as proposed. Moreover, this subpart should not be read to preclude the Director from taking any other action or imposing any restriction or sanction authorized by applicable law, rule, order or regulation.

F. Subpart F—Suspension or Removal of Entity-Affiliated Party Charged With Felony

Section 1209.102—Hearing on Removal or Suspension

Section 1209.102 of the proposed rule sets forth the requirements for an informal hearing on a removal or suspension under section 1377(h) of the Safety and Soundness Act (12 U.S.C. 4636a(h)), and the timing and procedural matters of such hearings. Because the Safety and Soundness Act does not require a formal APA-type full evidentiary hearing on the record, the process is less formal. Nevertheless, the procedure provides the requisite due process requirements of notice and opportunity to respond. This provision in the proposed rule specified the requirements as to form, timing, conduct, submissions, and the record of the hearing.

The proposed rule allowed that an entity-affiliated party could have elected in writing to waive his or her right to appear in person or through counsel to make a statement, and to have the matter determined solely on the basis of a written submission, thus obviating an appearance hearing. Additionally, as proposed, the rule provided that the Director or his designee would have the discretion to determine to deny, permit, or limit oral testimony in a hearing. The sole purpose of the informal hearing is to determine whether the suspension or prohibition will be continued, modified, or terminated, or whether an order removing such party or prohibiting the party from participation in the affairs of the regulated entity will be rescinded or modified.

One commenter argued that: (1) The presiding officer should not have the power to determine whether to admit or exclude witness testimony, and (2) the rule should require the creation of a hearing transcript. FHFA disagrees with these comments for the reason that the Director has the authority to make such a determination, and written submissions may constitute the full record in the absence of an appearance. In any case, the recommended decision

would reflect all materials or testimony and be transmitted to the Director, who makes the final determination. These steps are sufficient in the context of this process to adequately protect the parties. Therefore, to provide for the efficient operation of the rule, FHFA is not adopting the modifications suggested by the commenter.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) requires that regulations involving the collection of information receive clearance from OMB. This rule contains no such collection of information requiring OMB approval under the Paperwork Reduction Act. Consequently, no information has been submitted to OMB for review.

V. Regulatory Impact

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the proposed regulation under the Regulatory Flexibility Act. FHFA certifies that the final regulation is not likely to have a significant economic impact on a substantial number of small business entities because the regulation applies to the Enterprises and Banks, which are not small entities for purposes of the Regulatory Flexibility Act. 5 U.S.C. 605(b).

List of Subjects

12 CFR Part 908

Administrative practice and procedure, Federal home loan banks, Penalties.

12 CFR Part 1209

Administrative practice and procedure, Federal home loan banks.

12 CFR Part 1780

Administrative practice and procedure, Penalties.

Accordingly, for the reasons set forth in the preamble, under the authority of 12 U.S.C. 4513b and 4526, the Federal Housing Finance Agency amends chapters IX, XII, and XVII of Title 12, Code of Federal Regulations, as follows:

CHAPTER IX—FEDERAL HOUSING FINANCE BOARD

Subchapter B—Federal Housing Finance Board Organization and Operations

PART 908—[REMOVED]

■ 1. Remove part 908.

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

Subchapter A–Organization and Operations

■ 2. Add part 1209 to subchapter A to read as follows:

PART 1209—RULES OF PRACTICE AND PROCEDURE

Subpart A—Scope and Authority

Sec.

Subpart B—Enforcement Proceedings Under Sections 1371 Through 1379D of the Safety and Soundness Act

Subpart C—Rules of Practice and Procedure

Subpart D—Parties and Representational Practice Before the Federal Housing Finance Agency; Standards of Conduct

Subpart E—Civil Money Penalty Inflation Adjustments

Subpart F—Suspension or Removal of an Entity-Affiliated Party Charged With Felony

Authority: 5 U.S.C. 554, 556, 557, and 701 *et seq.;* 12 U.S.C. 4501, 4503, 4511, 4513, 4513b, 4517, 4526, 4531, 4535, 4536, 4581, 4585, 4631–4641; and 28 U.S.C. 2461 note.

Subpart A—Scope and Authority

§ 1209.1 Scope.

(a) *Authority.* This part sets forth the Rules of Practice and Procedure for hearings on the record in administrative enforcement proceedings in accordance with the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Title XIII of the Housing and Community Development Act of 1992, Public Law 102–550, sections 1301 *et seq.,* codified at 12 U.S.C. 4501 *et seq.,* as amended (the ''Safety and Soundness Act''), as stated in § 1209.4 of this part.[1]

[1] As used in this part, the ''Safety and Soundness Act'' means the Federal Housing Enterprise Financial Safety and Soundness Act of 1992, as amended. *See* § 1209.3. The Safety and Soundness Act was amended by the Housing and Economic Recovery Act of 2008, Public Law No. 110–289, sections 1101 *et seq.,* 122 Stat. 2654 (July 30, 2008) (HERA). Specifically, sections 1151 through 1158 of HERA amended sections 1371 through 1379D of the Safety and Soundness Act, (codified at 12 U.S.C.

Continued

(b) *Enforcement Proceedings.* Subpart B of this part (Enforcement Proceedings Under sections 1371 through 1379D of the Safety and Soundness Act) sets forth the statutory authority for enforcement proceedings under sections 1371 through 1379D of the Safety and Soundness Act (12 U.S.C. 4631 through 4641) (Enforcement Proceedings).

(c) *Rules of Practice and Procedure.* Subpart C of this part (Rules of Practice and Procedure) prescribes the general rules of practice and procedure applicable to adjudicatory proceedings that the Director is required by statute to conduct on the record after opportunity for a hearing under the Administrative Procedure Act, 5 U.S.C. 554, 556, and 557, under the following statutory provisions:

(1) Enforcement proceedings under sections 1371 through 1379D of the Safety and Soundness Act, as amended (12 U.S.C. 4631 through 4641);

(2) Removal, prohibition, and civil money penalty proceedings for violations of post-employment restrictions imposed by applicable law; and

(3) Proceedings under section 102 of the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4012a) to assess civil money penalties.

(d) *Representation and conduct.* Subpart D of this part (Parties and Representational Practice before the Federal Housing Finance Agency; Standards of Conduct) sets out the rules of representation and conduct that shall govern any appearance by any person, party, or representative of any person or party, before a presiding officer, the Director of FHFA, or a designated representative of the Director or FHFA staff, in any proceeding or matter pending before the Director.

(e) *Civil money penalty inflation adjustments.* Subpart E of this part (Civil Money Penalty Inflation Adjustments) sets out the requirements for the periodic adjustment of maximum civil money penalty amounts under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (Inflation Adjustment Act) on a recurring four-year cycle.[2]

(f) *Informal proceedings.* Subpart F of this part (Suspension or Removal of an Entity-Affiliated Party Charged with Felony) sets out the scope and procedures for the suspension or removal of an entity-affiliated party charged with a felony under section 1377(h) of the Safety and Soundness Act (12 U.S.C. 4636a(h)), which provides for an informal hearing before the Director.

§ 1209.2 Rules of construction.

For purposes of this part:

(a) Any term in the singular includes the plural and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neuter gender encompasses all three, if such use would be appropriate; and

(c) Unless the context requires otherwise, a party's representative of record, if any, on behalf of that party, may take any action required to be taken by the party.

§ 1209.3 Definitions.

For purposes of this part, unless explicitly stated to the contrary:

Adjudicatory proceeding means a proceeding conducted pursuant to these rules, on the record, and leading to the formulation of a final order other than a regulation.

Agency has the meaning defined in section 1303(2) of the Safety and Soundness Act (12 U.S.C. 4502(2)).

Associated with the regulated entity means, for purposes of section 1379 of the Safety and Soundness Act (12 U.S.C. 4637), any direct or indirect involvement or participation in the conduct of operations or business affairs of a regulated entity, including engaging in activities related to the operations or management of, providing advice or services to, consulting or contracting with, serving as agent for, or in any other way affecting the operations or business affairs of a regulated entity—with or without regard to—any direct or indirect payment, promise to make payment, or receipt of any compensation or thing of value, such as money, notes, stock, stock options, or other securities, or other benefit or remuneration of any kind, by or on behalf of the regulated entity, except any payment made pursuant to a retirement plan or deferred compensation plan, which is determined by the Director to be permissible under section 1318(e) of the Safety and Soundness Act (12 U.S.C. 4518(e)), or by reason of the death or disability of the party, in the form and manner commonly paid or provided to retirees of the regulated entity, unless such payment, compensation, or such benefit is promised or provided to or for the benefit of said party for the provision of services or other benefit to the regulated entity.

Authorizing statutes has the meaning defined in section 1303(3) of the Safety and Soundness Act (12 U.S.C. 4502(3)).

Bank Act means the Federal Home Loan Bank Act, as amended (12 U.S.C. 1421 *et seq.*).

Board or Board of Directors means the board of directors of any Enterprise or Federal Home Loan Bank (Bank), as provided for in the respective authorizing statutes.

Decisional employee means any member of the Director's or the presiding officer's staff who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Director or the presiding officer, respectively, in preparing orders, recommended decisions, decisions, and other documents under subpart C of this part.

Director has the meaning defined in section 1303(9) of the Safety and Soundness Act (12 U.S.C. 4502(9)); except, as the context requires in this part, ''director'' may refer to a member of the Board of Directors or any Board committee of an Enterprise, a Federal Home Loan Bank, or the Office of Finance.

Enterprise has the meaning defined in section 1303(10) of the Safety and Soundness Act (12 U.S.C. 4502(10)).

Entity-affiliated party has the meaning defined in section 1303(11) of the Safety and Soundness Act (12 U.S.C. 4502(11)), and may include an executive officer, any director, or management of the Office of Finance, as applicable under relevant provisions of the Safety and Soundness Act or FHFA regulations.

Executive officer has the meaning defined in section 1303(12) of the Safety and Soundness Act (12 U.S.C. 4502(12)), and may include an executive officer of the Office of Finance, as applicable under relevant provisions of the Safety and Soundness Act or FHFA regulations.

FHFA means the Federal Housing Finance Agency as defined in section 1303(2) of the Safety and Soundness Act (12 U.S.C. 4502(2)).

Notice of charges means the charging document served by FHFA to commence an enforcement proceeding under this part for the issuance of a cease and desist order; removal, suspension, or prohibition order; or an order to assess a civil money penalty, under 12 U.S.C. 4631 through 4641 and § 1209.23. A ''notice of charges,'' as used or referred to as such in this part, is not an ''effective notice'' under section 1375(a) of the Safety and Soundness Act (12 U.S.C. 4635(a)).

Office of Finance has the meaning defined in section 1303(19) of the Safety and Soundness Act (12 U.S.C. 4502(19)).

4631 through 4641) (hereafter, ''Enforcement Proceedings'').

[2] Public Law 101–410, 104 Stat. 890, as amended by the Debt Collection Improvement Act of 1996, Public Law 104–134, Title III, sec. 31001(s)(1), Apr. 26, 1996, 110 Stat. 1321–373; Public Law 105–362, Title XIII, sec. 1301(a), Nov. 10, 1998, 112 Stat. 3293 (28 U.S.C. 2461 note).

Party means any person named as a respondent in any notice of charges, or FHFA, as the context requires in this part.

Person means an individual, sole proprietor, partnership, corporation, unincorporated association, trust, joint venture, pool, syndicate, organization, regulated entity, entity-affiliated party, or other entity.

Presiding officer means an administrative law judge or any other person appointed by or at the request of the Director under applicable law to conduct an adjudicatory proceeding under this part.

Regulated entity has the meaning defined in section 1303(20) of the Safety and Soundness Act (12 U.S.C. 4502(20)).

Representative of record means an individual who is authorized to represent a person or is representing himself and who has filed a notice of appearance and otherwise has complied with the requirements under § 1209.72. FHFA's representative of record may be referred to as FHFA counsel of record, agency counsel or enforcement counsel.

Respondent means any party that is the subject of a notice of charges under this part.

Safety and Soundness Act means Title XIII of the Housing and Community Development Act of 1992, Public Law 102–550, known as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4501 *et seq.*)

Violation has the meaning defined in section 1303(25) of the Safety and Soundness Act (12 U.S.C. 4502(25)).

Subpart B—Enforcement Proceedings Under Sections 1371 Through 1379D of the Safety and Soundness Act

§ 1209.4 Scope and authority.

The rules of practice and procedure set forth in Subpart C (Rules of Practice and Procedure) of this part shall be applicable to any hearing on the record conducted by FHFA in accordance with sections 1371 through 1379D of the Safety and Soundness Act (12 U.S.C. 4631 through 4641), as follows:

(a) Cease-and-desist proceedings under sections 1371 and 1373 of the Safety and Soundness Act, (12 U.S.C. 4631, 4633);

(b) Civil money penalty assessment proceedings under sections 1373 and 1376 of the Safety and Soundness Act, (12 U.S.C. 4633, 4636); and

(c) Removal and prohibition proceedings under sections 1373 and 1377 of the Safety and Soundness Act, (12 U.S.C. 4633, 4636a), except removal proceedings under section 1377(h) of the Safety and Soundness Act, (12 U.S.C. 4636a(h)).

§ 1209.5 Cease and desist proceedings.

(a) *Cease and desist proceedings.*—(1) *Authority.*—(i) *In general.* As prescribed by section 1371(a) of the Safety and Soundness Act (12 U.S.C. 4631(a)), if in the opinion of the Director, a regulated entity or any entity-affiliated party is engaging or has engaged, or the Director has reasonable cause to believe that the regulated entity or any entity-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of the regulated entity or the Office of Finance, or is violating or has violated, or the Director has reasonable cause to believe is about to violate, a law, rule, regulation, or order, or any condition imposed in writing by the Director in connection with the granting of any application or other request by the regulated entity or the Office of Finance or any written agreement entered into with the Director, the Director may issue and serve upon the regulated entity or entity-affiliated party a notice of charges (as described in § 1209.23) to institute cease and desist proceedings, except with regard to the enforcement of any housing goal that must be addressed under sections 1341 and 1345 of the Safety and Soundness Act (12 U.S.C. 4581, 4585).

(ii) *Hearing on the record.* In accordance with section 1373 of the Safety and Soundness Act (12 U.S.C. 4633), a hearing on the record shall be held in the District of Columbia. Subpart C of this part shall govern the hearing procedures.

(iii) *Consent to order.* Unless the party served with a notice of charges shall appear at the hearing personally or through an authorized representative of record, the party shall be deemed to have consented to the issuance of the cease and desist order.

(2) *Unsatisfactory rating.* In accordance with section 1371(b) of the Safety and Soundness Act (12 U.S.C. 4631(b)), if a regulated entity receives, in its most recent report of examination, a less-than-satisfactory rating for asset quality, management, earnings, or liquidity, the Director may deem the regulated entity to be engaging in an unsafe or unsound practice within the meaning of section 1371(a) of the Safety and Soundness Act (12 U.S.C. 4631(a)), if any such deficiency has not been corrected.

(3) *Order.* As provided by section 1371(c)(2) of the Safety and Soundness Act (12 U.S.C. 4631(c)(2)), if the Director finds on the record made at a hearing in accordance with section 1373 of the Safety and Soundness Act (12 U.S.C. 4633) that any practice or violation specified in the notice of charges has been established (or the regulated entity or entity-affiliated party consents pursuant to section 1373(a)(4) of the Safety and Soundness Act (12 U.S.C. 4633(a)(4)), the Director may issue and serve upon the regulated entity, executive officer, director, or entity-affiliated party, an order (as set forth in § 1209.55) requiring such party to cease and desist from any such practice or violation and to take affirmative action to correct or remedy the conditions resulting from any such practice or violation.

(b) *Affirmative action to correct conditions resulting from violations or activities.* The authority to issue a cease and desist order or a temporary cease and desist order requiring a regulated entity, executive officer, director, or entity-affiliated party to take affirmative action to correct or remedy any condition resulting from any practice or violation with respect to which such cease and desist order or temporary cease and desist order is set forth in section 1371(a), (c)(2), and (d) of the Safety and Soundness Act (12 U.S.C. 4631(a), (c)(2), and (d)), and includes the authority to:

(1) Require the regulated entity or entity-affiliated party to make restitution, or to provide reimbursement, indemnification, or guarantee against loss, if—

(i) Such entity or party or finance facility was unjustly enriched in connection with such practice or violation, or

(ii) The violation or practice involved a reckless disregard for the law or any applicable regulations, or prior order of the Director;

(2) Require the regulated entity to seek restitution, or to obtain reimbursement, indemnification, or guarantee against loss; as

(3) Restrict asset or liability growth of the regulated entity;

(4) Require the regulated entity to obtain new capital;

(5) Require the regulated entity to dispose of any loan or asset involved;

(6) Require the regulated entity to rescind agreements or contracts;

(7) Require the regulated entity to employ qualified officers or employees (who may be subject to approval by the Director at the direction of the Director); and

(8) Require the regulated entity to take such other action, as the Director determines appropriate, including limiting activities.

(c) *Authority to limit activities.* As provided by section 1371(e) of the Safety and Soundness Act (12 U.S.C. 4631(e)), the authority of the Director to issue a cease and desist order under section 1371 of the Safety and

Soundness Act (12 U.S.C. 4631) or a temporary cease and desist order under section 1372 of the Safety and Soundness Act (12 U.S.C. 4632), includes the authority to place limitations on the activities or functions of the regulated entity or entity-affiliated party or any executive officer or director of the regulated entity or entity-affiliated party.

(d) *Effective date of order; judicial review.*—(*1) Effective date.* The effective date of an order is as set forth in section 1371(f) of the Safety and Soundness Act (12 U.S.C. 4631(f)).

(2) *Judicial review.* Judicial review is governed by section 1374 of the Safety and Soundness Act (12 U.S.C. 4634).

§ 1209.6 Temporary cease and desist orders.

(a) *Temporary cease and desist orders.*—(1) *Grounds for issuance.* The grounds for issuance of a temporary cease and desist order are set forth in section 1372(a) of the Safety and Soundness Act (12 U.S.C. 4632(a)). In accordance with section 1372(a) of the Safety and Soundness Act (12 U.S.C. 4632(a)), the Director may:

(i) Issue a temporary order requiring that regulated entity or entity-affiliated party to cease and desist from any violation or practice specified in the notice of charges; and

(ii) Require that regulated entity or entity-affiliated party to take affirmative action to prevent or remedy any insolvency, dissipation, condition, or prejudice, pending completion of the proceedings.

(2) *Additional requirements.* As provided by section 1372(a)(2) of the Safety and Soundness Act (12 U.S.C. 4632(a)(2)), an order issued under section 1372(a)(1) of the Safety and Soundness Act (12 U.S.C. 4632(a)(1)) may include any requirement authorized under section 1371(d) of the Safety and Soundness Act (12 U.S.C. 4631(d)).

(b) *Effective date of temporary order.* The effective date of a temporary order is as provided by section 1372(b) of the Safety and Soundness Act (12 U.S.C. 4632(b)). And, unless set aside, limited, or suspended by a court in proceedings pursuant to the judicial review provisions of section 1372(d) of the Safety and Soundness Act (12 U.S.C. 4632(d)), shall remain in effect and enforceable pending the completion of the proceedings pursuant to such notice of charges, and shall remain effective until the Director dismisses the charges specified in the notice or until superseded by a cease-and-desist order issued pursuant to section 1371 of the Safety and Soundness Act (12 U.S.C. 4631).

(c) *Incomplete or inaccurate records.*—(1) *Temporary order.* As provided by section 1372(c) of the Safety and Soundness Act (12 U.S.C. 4632(c)), if a notice of charges served under section 1371(a) or (b) of the Safety and Soundness Act (12 U.S.C. 4631(a), (b)), specifies on the basis of particular facts and circumstances that the books and records of the regulated entity served are so incomplete or inaccurate that the Director is unable, through the normal supervisory process, to determine the financial condition of the regulated entity or the details or the purpose of any transaction or transactions that may have a material effect on the financial condition of that regulated entity, the Director may issue a temporary order requiring:

(i) The cessation of any activity or practice that gave rise, whether in whole or in part, to the incomplete or inaccurate state of the books or records; or

(ii) Affirmative action to restore the books or records to a complete and accurate state.

(2) *Effective period.* Any temporary order issued under section 1372(c)(1) of the Safety and Soundness Act (12 U.S.C. 4632(c)(1)) shall become effective upon service, and remain in effect and enforceable unless set aside, limited, or suspended in accordance with section 1372(d) of the Safety and Soundness Act (12 U.S.C. 4632(d)), as provided by section 1372(c)(2) of the Safety and Soundness Act (12 U.S.C. 4632(c)(2)).

(d) *Judicial review.* Section 1372(d) of the Safety and Soundness Act (12 U.S.C. 4632(d)), authorizes a regulated entity, executive officer, director, or entity-affiliated party that has been served with a temporary order pursuant to section 1372(a) or (b) of the Safety and Soundness Act (12 U.S.C. 4632(a), (b)) to apply to the United States District Court for the District of Columbia within 10 days after service of the temporary order for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of the temporary order, pending the completion of the administrative enforcement proceeding. The district court has jurisdiction to issue such injunction.

(e) *Enforcement of temporary order.* As provided by section 1372(e) of the Safety and Soundness Act (12 U.S.C. 4632(e)), in the case of any violation, threatened violation, or failure to obey a temporary order issued pursuant to this section, the Director may bring an action in the United States District Court for the District of Columbia for an injunction to enforce a temporary order, and the district court is to issue such injunction upon a finding made in accordance with section 1372(e) of the Safety and Soundness Act (12 U.S.C. 4632(e)).

§ 1209.7 Civil money penalties.

(a) *Civil money penalty proceedings.*—(1) *In general.* Section 1376 of the Safety and Soundness Act (12 U.S.C. 4636) governs the imposition of civil money penalties. Upon written notice, which shall conform to the requirements of § 1209.23 of this part, and a hearing on the record to be conducted in accordance with subpart C of this part, the Director may impose a civil money penalty on any regulated entity or any entity-affiliated party as provided by section 1376 of the Safety and Soundness Act for any violation, practice, or breach addressed under sections 1371, 1372, or 1376 of the Safety and Soundness Act (12 U.S.C. 4631, 4632, 4636), except with regard to the enforcement of housing goals that are addressed separately under sections 1341 and 1345 of the Safety and Soundness Act (12 U.S.C. 4581, 4585).

(2) *Amount of penalty.*—(i) *First Tier.* Section 1376(b)(1) of the Safety and Soundness Act (12 U.S.C. 4636(b)(1)) prescribes the civil penalty for violations as stated therein, in the amount of $10,000 for each day during which a violation continues.

(ii) *Second Tier.* Section 1376(b)(2) of the Safety and Soundness Act (12 U.S.C. 4636(b)(2)) provides that notwithstanding paragraph (b)(1) thereof, a regulated entity or entity-affiliated party shall forfeit and pay a civil penalty of not more than $50,000 for each day during which a violation, practice, or breach continues, if the regulated entity or entity-affiliated party commits any violation described in (b)(1) thereof, recklessly engages in an unsafe or unsound practice, or breaches any fiduciary duty, and the violation, practice, or breach is part of a pattern of misconduct; causes or is likely to cause more than a minimal loss to the regulated entity; or results in pecuniary gain or other benefit to such party.

(iii) *Third Tier.* Section 1376(b)(3) of the Safety and Soundness Act (12 U.S.C. 4636(b)(3)) provides that, notwithstanding paragraphs (b)(1) and (b)(2) thereof, any regulated entity or entity-affiliated party shall forfeit and pay a civil penalty, in accordance with section 1376(b)(4) of the Safety and Soundness Act (12 U.S.C. 4636(b)(4)), for each day during which such violation, practice, or breach continues, if such regulated entity or entity-affiliated party:

(A) Knowingly—

(*1*) Commits any violation described in any subparagraph of section 1376(b)(1) of the Safety and Soundness Act;

(*2*) Engages in any unsafe or unsound practice in conducting the affairs of the regulated entity; or

(*3*) Breaches any fiduciary duty; and

(B) Knowingly or recklessly causes a substantial loss to the regulated entity or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach.

(b) *Maximum amounts.*—(1) *Maximum daily penalty.* Section 1376(b)(4) of the Safety and Soundness Act (12 U.S.C. 4636(b)(4)), prescribes the maximum daily amount of a civil penalty that may be assessed for any violation, practice, or breach pursuant to section 1376(b)(3) of the Safety and Soundness Act (12 U.S.C. 4636(b)(3)), in the case of any entity-affiliated party (not to exceed $2,000,000.00), and in the case of any regulated entity ($2,000,000.00).

(2) *Inflation Adjustment Act.* The maximum civil penalty amounts are subject to periodic adjustment under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note), as provided in subpart E of this part.

(c) *Factors in determining amount of penalty.* In accordance with section 1376(c)(2) of the Safety and Soundness Act (12 U.S.C. 4636(c)(2)), in assessing civil money penalties on a regulated entity or an entity-affiliated party in amounts as provided in section 1376(b) of the Safety and Soundness Act (12 U.S.C. 4636(b)), the Director shall give consideration to such factors as:

(1) The gravity of the violation, practice, or breach;

(2) Any history of prior violations or supervisory actions, or any attempts at concealment;

(3) The effect of the penalty on the safety and soundness of the regulated entity or the Office of Finance;

(4) Any loss or risk of loss to the regulated entity or to the Office of Finance;

(5) Any benefits received or derived, whether directly or indirectly, by the respondent(s);

(6) Any injury to the public;

(7) Any deterrent effect on future violations, practices, or breaches;

(8) The financial capacity of the respondent(s), or any unusual circumstance(s) of hardship upon an executive officer, director, or other individual;

(9) The promptness, cost, and effectiveness of any effort to remedy or ameliorate the consequences of the violation, practice, or breach;

(10) The candor and cooperation, if any, of the respondent(s); and

(11) Any other factors the Director may determine by regulation to be appropriate.

(d) *Review of imposition of penalty.* Section 1376(c)(3) of the Safety and Soundness Act (12 U.S.C. 4636(c)(3)) governs judicial review of a penalty order under section 1374 of the Safety and Soundness Act (12 U.S.C. 4634).

§ 1209.8 Removal and prohibition proceedings.

(a) *Removal and prohibition proceedings.*—(1) *Authority to issue order.* As provided by section 1377(a)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(a)(1)), the Director may serve upon a party described in paragraph (a)(2) of this section, or any officer, director, or management of the Office of Finance, a notice of the intention of the Director to suspend or remove such party from office, or to prohibit any further participation by such party in any manner in the conduct of the affairs of the regulated entity or the Office of Finance.

(2) *Applicability.* As provided by section 1377(a)(2) of the Safety and Soundness Act (12 U.S.C. 4636a(a)(2)), a party described in this paragraph is an entity-affiliated party or any officer, director, or management of the Office of Finance, if the Director determines that:

(i) That party, officer, or director has, directly or indirectly—

(A) Violated—

(1) Any law or regulation;

(2) Any cease and desist order that has become final;

(3) Any condition imposed in writing by the Director in connection with an application, notice, or other request by a regulated entity; or

(4) Any written agreement between such regulated entity and the Director;

(B) Engaged or participated in any unsafe or unsound practice in connection with any regulated entity or business institution; or

(C) Committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(ii) By reason of such violation, practice, or breach—

(A) Such regulated entity or business institution has suffered or likely will suffer financial loss or other damage; or

(B) Such party directly or indirectly received financial gain or other benefit; and

(iii) The violation, practice, or breach described in subparagraph (i) of this section—

(A) Involves personal dishonesty on the part of such party; or

(B) Demonstrates willful or continuing disregard by such party for the safety or soundness of such regulated entity or business institution.

(3) *Applicability to business entities.* Under section 1377(f) of the Safety and Soundness Act (12 U.S.C. 4636a(f)), this remedy applies only to a person who is an individual, unless the Director specifically finds that it should apply to a corporation, firm, or other business entity.

(b) *Suspension order.*—(1) *Suspension or prohibition authorized.* If the Director serves written notice under section 1377(a) of the Safety and Soundness Act (12 U.S.C. 4636a(a)) upon a party subject to that section, the Director may, by order, suspend or remove such party from office, or prohibit such party from further participation in any manner in the conduct of the affairs of the regulated entity or the Office of Finance, if the Director:

(i) Determines that such action is necessary for the protection of the regulated entity or the Office of Finance; and

(ii) Serves such party with written notice of the order.

(2) *Effective period.* The effective period of any order under section 1377(b)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(b)(1)) is specified in section 1377(b)(2) of the Safety and Soundness Act (12 U.S.C. 4636a(b)(2)). An order of suspension shall become effective upon service and, absent a court-ordered stay, remains effective and enforceable until the date the Director dismisses the charges or the effective date of an order issued by the Director under section 1377(c)(4) of the Safety and Soundness Act (12 U.S.C. 4636a(c)(4),(5)).

(3) *Copy of order to be served on regulated entity.* In accordance with section 1377(b)(3) of the Safety and Soundness Act (12 U.S.C. 4636a(b)(3)), the Director will serve a copy of any order to suspend, remove, or prohibit participation in the conduct of the affairs on the Office of Finance or any regulated entity with which such party is affiliated at the time such order is issued.

(c) *Notice; hearing and order.*—(1) *Written notice.* A notice of the intention of the Director to issue an order under sections 1377(a) and (c) of the Safety and Soundness Act, (12 U.S.C. 4636a(a), (c)), shall conform with § 1209.23, and may include any such additional information as the Director may require.

(2) *Hearing.* A hearing on the record shall be held in the District of Columbia in accordance with sections 1373(a)(1) and 1377(c)(2) of the Safety and Soundness Act. *See* 12 U.S.C. 4633(a)(1), 4636a(c)(2).

(3) *Consent.* As provided by section 1377(c)(3) of the Safety and Soundness Act (12 U.S.C. 4636a(c)(3)), unless the party that is the subject of a notice delivered under paragraph (a) of this section appears in person or by a duly authorized representative of record, in the adjudicatory proceeding, such party shall be deemed to have consented to the issuance of an order under this section.

(4) *Issuance of order of suspension or removal.* As provided by section 1377(c)(4) of the Safety and Soundness Act (12 U.S.C. 4636a(c)(4)), the Director may issue an order under this part, as the Director may deem appropriate, if:

(i) A party is deemed to have consented to the issuance of an order under paragraph (d); or

(ii) Upon the record made at the hearing, the Director finds that any of the grounds specified in the notice have been established.

(5) *Effectiveness of order.* As provided by section 1377(c)(5) of the Safety and Soundness Act (12 U.S.C. 4636a(c)(5)), any order issued and served upon a party in accordance with this section shall become effective at the expiration of 30 days after the date of service upon such party and any regulated entity or entity-affiliated party. An order issued upon consent under paragraph (c)(3) of this section, however, shall become effective at the time specified therein. Any such order shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by action of the Director or a reviewing court.

(d) *Prohibition of certain activities and industry-wide prohibition.*—(1) *Prohibition of certain activities.* As provided by section 1377(d) of the Safety and Soundness Act (12 U.S.C. 4636a(d)), any person subject to an order issued under subpart B of this part shall not—

(i) Participate in any manner in the conduct of the affairs of any regulated entity or the Office of Finance;

(ii) Solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights in any regulated entity;

(iii) Violate any voting agreement previously approved by the Director; or

(iv) Vote for a director, or serve or act as an entity-affiliated party of a regulated entity or as an officer or director of the Office of Finance.

(2) *Industry-wide prohibition.* As provided by section 1377(e)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(e)(1)), except as provided in section 1377(e)(2) of the Safety and Soundness Act (12 U.S.C. 4636a(e)(2)), any person who, pursuant to an order issued under section 1377 of the Safety and Soundness Act (12 U.S.C. 4636a), has been removed or suspended from office in a regulated entity or the Office of Finance, or prohibited from participating in the conduct of the affairs of a regulated entity or the Office of Finance, may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of, any regulated entity or the Office of Finance.

(3) *Relief from industry-wide prohibition at the discretion of the Director.*—(i) *Relief from order.* As provided by section 1377(e)(2) of the Safety and Soundness Act (12 U.S.C. 4636a(e)(2)), if, on or after the date on which an order has been issued under section 1377 of the Safety and Soundness Act (12 U.S.C. 4636a) that removes or suspends from office any party, or prohibits such party from participating in the conduct of the affairs of a regulated entity or the Office of Finance, such party receives the written consent of the Director, the order shall cease to apply to such party with respect to the regulated entity or the Office of Finance to the extent described in the written consent. Such written consent shall be on such terms and conditions as the Director therein may specify in his discretion. Any such consent shall be publicly disclosed.

(ii) *No private right of action; no final agency action.* Nothing in this paragraph shall be construed to require the Director to entertain or to provide such written consent, or to confer any rights to such consideration or consent upon any party, regulated entity, entity-affiliated party, or the Office of Finance. Additionally, whether the Director consents to relief from an outstanding order under this part is committed wholly to the discretion of the Director, and such determination shall not be a final agency action for purposes of seeking judicial review.

(4) *Violation of industry-wide prohibition.* As provided by section 1377(e)(3) of the Safety and Soundness Act (12 U.S.C. 4636a(e)(3)), any violation of section 1377(e)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(e)(1)) by any person who is subject to an order issued under section 1377(h) of the Safety and Soundness Act (12 U.S.C. 4636a(h)) (suspension or removal of entity-affiliated party charged with felony) shall be treated as a violation of the order.

(e) *Stay of suspension or prohibition of entity-affiliated party.* As provided by section 1377(g) of the Safety and Soundness Act (12 U.S.C. 4636a(g)), not later than 10 days after the date on which any entity-affiliated party has been suspended from office or prohibited from participation in the conduct of the affairs of a regulated entity, such party may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district in which the headquarters of the regulated entity is located, for a stay of such suspension or prohibition pending the completion of the administrative enforcement proceeding pursuant to section 1377(c) of the Safety and Soundness Act (12 U.S.C. 4636a(c)). The court shall have jurisdiction to stay such suspension or prohibition, but such jurisdiction does not extend to the administrative enforcement proceeding.

§ 1209.9 Supervisory actions not affected.

As provided by section 1311(c) of the Safety and Soundness Act (12 U.S.C. 4511(c)), the authority of the Director to take action under subtitle A of the Safety and Soundness Act (12 U.S.C. 4611 *et seq.*) (*e.g.,* the appointment of a conservator or receiver for a regulated entity; entering into a written agreement or pursuing an informal agreement with a regulated entity as the Director deems appropriate; and undertaking other such actions as may be applicable to undercapitalized, significantly undercapitalized or critically undercapitalized regulated entities), or to initiate enforcement proceedings under subtitle C of the Safety and Soundness Act (12 U.S.C. 4631 *et seq.*), shall not in any way limit the general supervisory or regulatory authority granted the Director under section 1311(b) of the Safety and Soundness Act (12 U.S.C. 4511(b)). The selection and form of regulatory or supervisory action under the Safety and Soundness Act is committed to the discretion of the Director, and the selection of one form of action or a combination of actions does not foreclose the Director from pursuing any other supervisory action authorized by law.

Subpart C—Rules of Practice and Procedure

§ 1209.10 Authority of the Director.

The Director may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of any act that could be done or ordered by the presiding officer.

§ 1209.11 Authority of the Presiding Officer.

(a) *General rule.* All proceedings governed by subpart C of this part shall be conducted consistent with the provisions of chapter 5 of Title 5 of the

United States Code. The presiding officer shall have complete charge of the adjudicative proceeding, conduct a fair and impartial hearing, avoid unnecessary delay, and assure that a complete record of the proceeding is made.

(b) *Powers.* The presiding officer shall have all powers necessary to conduct the proceeding in accordance with paragraph (a) of this section and 5 U.S.C. 556(c). The presiding officer is authorized to:

(1) *Control the proceedings.* (i) Upon reasonable notice to the parties, not earlier than 30 days or later than 60 days after service of a notice of charges under the Safety and Soundness Act, set a date, time, and place for an evidentiary hearing on the record, within the District of Columbia, as provided in section 1373 of the Safety and Soundness Act (12 U.S.C. 4633), in a scheduling order that may be issued in conjunction with the initial scheduling conference set under § 1209.36, or otherwise as the presiding officer finds in the best interest of justice, in accordance with this part; and

(ii) Upon reasonable notice to the parties, reset or change the date, time, or place (within the District of Columbia) of an evidentiary hearing;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to address legal or factual issues, or evidentiary matters materially relevant to the charges or allowable defenses; to regulate the timing and scope of discovery and rule on discovery plans; or otherwise to consider matters that may facilitate an effective, fair, and expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue and enforce subpoenas, subpoenas *duces tecum,* discovery and protective orders, as authorized by this part, and to revoke, quash, or modify such subpoenas issued by the presiding officer;

(6) Take and preserve testimony under oath;

(7) Rule on motions and other procedural matters appropriate in an adjudicatory proceeding, except that only the Director shall have the power to grant summary disposition or any motion to dismiss the proceeding or to make a final determination of the merits of the proceeding;

(8) Take all actions authorized under this part to regulate the scope, timing, and completion of discovery of any non-privileged documents that are materially relevant to the charges or allowable defenses;

(9) Regulate the course of the hearing and the conduct of representatives and parties;

(10) Examine witnesses;

(11) Receive materially relevant evidence, and rule upon the admissibility of evidence or exclude, limit, or otherwise rule on offers of proof;

(12) Upon motion of a party, take official notice of facts;

(13) Recuse himself upon his own motion or upon motion made by a party;

(14) Prepare and present to the Director a recommended decision as provided in this part;

(15) Establish time, place, and manner limitations on the attendance of the public and the media for any public hearing; and

(16) Do all other things necessary or appropriate to discharge the duties of a presiding officer.

§ 1209.12 Public hearings; closed hearings.

(a) *General rule.* As provided in section 1379B(b) of the Safety and Soundness Act (12 U.S.C. 4639(b)), all hearings shall be open to the public, except that the Director, in his discretion, may determine that holding an open hearing would be contrary to the public interest. The Director may make such determination *sua sponte* at any time by written notice to all parties, or as provided in paragraphs (b) and (c) of this section.

(b) *Motion for closed hearing.* Within 20 days of service of the notice of charges, any party may file with the presiding officer a motion for a private hearing and any party may file a pleading in reply to the motion. The presiding officer shall forward the motion and any reply, together with a recommended decision on the motion, to the Director, who shall make a final determination. Such motions and replies are governed by § 1209.28 of this part. A determination under this section is committed to the discretion of the Director and is not a reviewable final agency action.

(c) *Filing documents under seal.* FHFA counsel of record, in his discretion, may file or require the filing of any document or part of a document under seal, if such counsel makes a written determination that disclosure of the document would be contrary to the public interest. The presiding officer shall issue an order to govern confidential information, and take all appropriate steps to preserve the confidentiality of such documents in whole or in part, including closing any portion of a hearing to the public or issuing a protective order under such terms as may be acceptable to FHFA counsel of record.

(d) *Procedures for closed hearing.* An evidentiary hearing, or any part thereof, that is closed for the purpose of offering into evidence testimony or documents filed under seal as provided in paragraph (c) of this section shall be conducted under procedures that may include: prior notification to the submitter of confidential information; provisions for sealing portions of the record, briefs, and decisions; *in camera* arguments, offers of proof, and testimony; and limitations on representatives of record or other participants, as the presiding officer may designate. Additionally, at such proceedings the presiding officer may make an opening statement as to the confidentiality and limitations and deliver an oath to the parties, representatives of record, or other approved participants as to the confidentiality of the proceedings.

§ 1209.13 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice of charges by the Director shall be signed by at least one representative of record in his individual name and shall state that representative's business contact information, which shall include his address, electronic mail address, and telephone number; and the names, addresses and telephone numbers of all other representatives of record for the person making the filing or submission.

(b) *Effect of signature.* (1) By signing a document, a representative of record or party appearing *pro se* certifies that:

(i) The representative of record or party has read the filing or submission of record;

(ii) To the best of his knowledge, information and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith, non-frivolous argument for the extension, modification, or reversal of existing law, regulation, or FHFA order or policy; and

(iii) The filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the presiding officer shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any

representative or party shall constitute a certification that to the best of his knowledge, information, and belief, formed after reasonable inquiry, his statements are well-grounded in fact and are warranted by existing law or a good faith, non-frivolous argument for the extension, modification, or reversal of existing law, regulation, or FHFA order or policy, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or to needlessly increase litigation-related costs.

§ 1209.14 Ex parte communications.

(a) *Definition.*—(1) *Ex parte* communication means any material oral or written communication relevant to an adjudication of the merits of any proceeding under this subpart that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person outside FHFA (including the person's representative of record); and

(ii) The presiding officer handling that proceeding, the Director, a decisional employee assigned to that proceeding, or any other person who is or may be reasonably expected to be involved in the decisional process.

(2) A communication that is procedural in that it does not concern the merits of an adjudicatory proceeding, such as a request for status of the proceeding, does not constitute an *ex parte* communication.

(b) *Prohibition of ex parte communications.* From the time a notice of charges commencing a proceeding under this part is issued by the Director until the date that the Director issues his final decision pursuant to § 1209.55 of this part, no person referred to in paragraph (a)(1)(i) of this section shall knowingly make or cause to be made an *ex parte* communication with the Director or the presiding officer. The Director, presiding officer, or a decisional employee shall not knowingly make or cause to be made an *ex parte* communication.

(c) *Procedure upon occurrence of ex parte communication.* If an *ex parte* communication is received by any person identified in paragraph (a) of this section, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All parties to the proceeding shall have an opportunity within 10 days of receipt of service of the *ex parte* communication to file responses thereto, and to recommend sanctions that they believe to be appropriate under the circumstances, in accordance with paragraph (d) of this section.

(d) *Sanctions.* Any party or representative for a party who makes an *ex parte* communication, or who encourages or solicits another to make an *ex parte* communication, may be subject to any appropriate sanction or sanctions imposed by the Director or the presiding officer, including, but not limited to, exclusion from the proceedings, an adverse ruling on the issue that is the subject of the prohibited communication, or other appropriate and commensurate action(s).

(e) *Consultations by presiding officer.* Except to the extent required for the disposition of *ex parte* matters as authorized by law, the presiding officer may not consult a person or party on any matter relevant to the merits of the adjudication, unless upon notice to and opportunity for all parties to participate.

(f) *Separation of functions.* An employee or agent engaged in the performance of any investigative or prosecuting function for FHFA in a case may not, in that or in a factually related case, participate or advise in the recommended decision, the Director's review under § 1209.55 of the recommended decision, or the Director's final determination on the merits based upon his review of the recommended decision, except as a witness or counsel in the adjudicatory proceedings. This section shall not prohibit FHFA counsel of record from providing necessary and appropriate legal advice to the Director on supervisory (including information or legal advice as to settlement issues) or regulatory matters.

§ 1209.15 Filing of papers.

(a) *Filing.* All pleadings, motions, memoranda, and any other submissions or papers required to be filed in the proceeding shall be addressed to the presiding officer and filed with FHFA, 1700 G Street, NW., Fourth Floor, Washington, DC 20552, in accordance with paragraphs (b) and (c) of this section.

(b) *Manner of filing.* Unless otherwise specified by the Director or the presiding officer, filing shall be accomplished by:

(1) *Overnight delivery.* Overnight U.S. Postal Service delivery or delivery by a reliable commercial delivery service for same day or overnight delivery to the address stated above; or

(2) *U.S. Mail.* First class, registered, or certified mail via the U.S. Postal Service; and

(3) *Electronic media.* Transmission by electronic media shall be required by and upon any conditions specified by the Director or the presiding officer. FHFA shall provide a designated site for the electronic filing of all papers in a proceeding in accordance with any conditions specified by the presiding officer. All papers filed by electronic media shall be filed concurrently in a manner set out above and in accordance with paragraph (c) of this section.

(c) *Formal requirements as to papers filed.*—(1) *Form.* To be filed, all papers must set forth the name, address, telephone number, and electronic mail address of the representative or party seeking to make the filing. Additionally, all such papers must be accompanied by a certification setting forth when and how service has been made on all other parties. All papers filed must be double-spaced on 8½ x 11-inch paper and must be clear, legible, and formatted as required by paragraph (c)(5) of this section.

(2) *Signature.* All papers filed must be dated and signed as provided in § 1209.13.

(3) *Caption.* All papers filed must include at the head thereof, or on a title page, the FHFA caption, title and docket number of the proceeding, the name of the filing party, and the subject of the particular paper.

(4) *Number of copies.* Unless otherwise specified by the Director or the presiding officer, an original and one copy of all pleadings, motions and memoranda, or other such papers shall be filed, except that only one copy of transcripts of testimony and exhibits shall be filed.

(5) *Content format.* All papers filed shall be formatted in such program(s) (*e.g.,* MS WORD©, MS Excel©, or WordPerfect©) as the presiding officer or Director shall specify.

§ 1209.16 Service of papers.

(a) Except as otherwise provided, a party filing papers or serving a subpoena shall serve a copy upon the representative of record for each party to the proceeding so represented, and upon any party who is not so represented, in accordance with the requirements of this section.

(b) Except as provided in paragraphs (c)(2) and (d) of this section, a serving party shall use one or more of the following methods of service:

(1) Personal service;

(2) Overnight U.S. Postal Service delivery or delivery by a reliable commercial delivery service for same day or overnight delivery to the parties' respective street addresses; or

(3) First class, registered, or certified mail via the U.S. Postal Service; and

(4) For transmission by electronic media, each party shall promptly

provide the presiding officer and all parties, in writing, an active electronic mail address where service will be accepted on behalf of such party. Any document transmitted via electronic mail for service on a party shall comply in all respects with the requirements of § 1209.15(c).

(5) Service of pleadings or other papers made by facsimile may not exceed a total page count of 30 pages. Any paper served by facsimile transmission shall meet the requirements of § 1209.15(c).

(6) Any party serving a pleading or other paper by electronic media under paragraph (4) of this section also shall concurrently serve that pleading or paper by one of the methods specified in paragraphs (1) through (5) of this section.

(c) *By the Director or the presiding officer.* (1) All papers required to be served by the Director or the presiding officer upon a party who has appeared in the proceeding in accordance with § 1209.72 shall be served by the means specified in paragraph (b) of this section.

(2) If a notice of appearance has not been filed in the proceeding for a party in accordance with § 1209.72, the Director or the presiding officer shall make service upon the party by any of the following methods:

(i) By personal service;

(ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(iii) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(iv) By registered or certified mail addressed to the person's last known address; or

(v) By any other method reasonably calculated to give actual notice.

(d) *Subpoenas.* Service of a subpoena may be made:

(1) By personal service;

(2) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works;

(3) If the person to be served is a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party;

(4) By registered or certified mail addressed to the person's last known address; or

(5) By any other method reasonably calculated to give actual notice.

(e) *Area of service.* Service in any State or the District of Columbia, or any commonwealth, possession, territory or other place subject to the jurisdiction of the United States, or on any person doing business in any State or the District of Columbia, or any commonwealth, possession, territory or other place subject to the jurisdiction of the United States, or on any person as otherwise permitted by law, is effective without regard to the place where the hearing is held.

(f) *Proof of service.* Proof of service of papers filed by a party shall be filed before action is taken thereon. The proof of service, which shall serve as prima facie evidence of the fact and date of service, shall show the date and manner of service and may be by written acknowledgment of service, by declaration of the person making service, or by certificate of a representative of record. However, failure to file proof of service contemporaneously with the papers shall not affect the validity of actual service. The presiding officer may allow the proof to be amended or supplied, unless to do so would result in material prejudice to a party.

§ 1209.17 Time computations.

(a) *General rule.* In computing any period of time prescribed or allowed under this part, the date of the act or event that commences the designated period of time is not included. Computations shall include the last day of the time period, unless the day falls on a Saturday, Sunday, or Federal holiday. When the last day is a Saturday, Sunday or Federal holiday, the period of time shall run until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays and Federal holidays are included in the computation of time. However, when the time period within which an act is to be performed is 10 days or less, not including any additional time allowed for in paragraph (c) of this section, intermediate Saturdays, Sundays and Federal holidays are not included.

(b) *When papers are deemed to be filed or served.* (1) Filing or service are deemed to be effective:

(i) In the case of personal service or same day reliable commercial delivery service, upon actual service;

(ii) In the case of U.S. Postal Service or reliable commercial overnight delivery service, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection;

(iii) In the case of transmission by electronic media, as specified by the authority receiving the filing, in the case of filing; or

(iv) In the case of transmission by electronic media or facsimile, when the device through which the document was sent provides a reliable indicator that the document has been received by the opposing party, in the case of service.

(2) The effective filing and service dates specified in paragraph (b)(1) of this section may be modified by the Director or the presiding officer, or by agreement of the parties in the case of service.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice, pleading or paper, the applicable time limits shall be calculated as follows:

(1) If service was made by delivery to the U.S. Postal Service for longer than overnight delivery service by first class, registered, or certified mail, add three calendar days to the prescribed period for the responsive pleading or other filing.

(2) If service was personal, or was made by delivery to the U.S. Postal Service or any reliable commercial delivery service for overnight delivery, add one calendar-day to the prescribed period for the responsive pleading or other filing.

(3) If service was made by electronic media transmission or facsimile, add one calendar-day to the prescribed period for the responsive pleading or other filing—unless otherwise determined by the Director or the presiding officer *sua sponte,* or upon motion of a party in the case of filing or by prior agreement among the parties in the case of service.

§ 1209.18 Change of time limits.

Except as otherwise by law required, the presiding officer may extend any time limit that is prescribed above or in any notice or order issued in the proceedings. After the referral of the case to the Director pursuant to § 1209.53, the Director may grant extensions of the time limits for good cause shown. Extensions may be granted on the motion of a party after notice and opportunity to respond is afforded all nonmoving parties, or on the Director's or the presiding officer's own motion.

§ 1209.19 Witness fees and expenses.

Witnesses (other than parties) subpoenaed for testimony (or for a deposition in lieu of personal appearance at a hearing) shall be paid the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a discovery subpoena addressed to a party, no witness fees or mileage shall be paid. Fees for witnesses shall be tendered in advance by the party requesting the subpoena, except that fees and mileage need not be tendered in advance where FHFA is the party requesting the subpoena. FHFA shall not be required to pay any fees to or expenses of any witness who was not subpoenaed by FHFA.

§ 1209.20 Opportunity for informal settlement.

Any respondent may, at any time in the proceeding, unilaterally submit to FHFA's counsel of record written offers or proposals for settlement of a proceeding without prejudice to the rights of any of the parties. No such offer or proposal shall be made to any FHFA representative other than FHFA counsel of record. Submission of a written settlement offer does not provide a basis for adjourning, deferring or otherwise delaying all or any portion of a proceeding under this part. No settlement offer or proposal, or any subsequent negotiation or resolution, is admissible as evidence in any proceeding.

§ 1209.21 Conduct of examination.

Nothing in this part limits or constrains in any manner any duty, authority, or right of FHFA to conduct or to continue any examination, investigation, inspection, or visitation of any regulated entity or entity-affiliated party.

§ 1209.22 Collateral attacks on adjudicatory proceeding.

If an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudicatory proceeding, the challenged adjudicatory proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudicatory proceeding within the times prescribed in subpart C of this part shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 1209.23 Commencement of proceeding and contents of notice of charges.

Proceedings under subpart C of this part are commenced by the Director by the issuance of a notice of charges, as defined in § 1209.3(p), that must be served upon a respondent. A notice of charges shall state all of the following:

(a) The legal authority for the proceeding and for FHFA's jurisdiction over the proceeding;

(b) A statement of the matters of fact or law showing that FHFA is entitled to relief;

(c) A proposed order or prayer for an order granting the requested relief;

(d) Information concerning the nature of the proceeding and pertinent procedural matters, including: the requirement that the hearing shall be held in the District of Columbia; the presiding officer will set the date and location for an evidentiary hearing in a scheduling order to be issued not less than 30 days or more than 60 days after service of the notice of charges; contact information for FHFA enforcement counsel and the presiding officer, if known; submission information for filings and appearances, the time within which to request a hearing, and citation to FHFA Rules of Practice and Procedure; and

(e) Information concerning proper filing of the answer, including the time within which to file the answer as required by law or regulation, a statement that the answer shall be filed with the presiding officer or with FHFA as specified therein, and the address for filing the answer (and request for a hearing, if applicable).

§ 1209.24 Answer.

(a) *Filing deadline.* Unless otherwise specified by the Director in the notice, respondent shall file an answer within 20 days of service of the notice of charges initiating the enforcement action.

(b) *Content of answer.* An answer must respond specifically to each paragraph or allegation of fact contained in the notice of charges and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice that is not denied in the answer is deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *Default.* Failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of such respondent's right to appear and contest the allegations in the notice. If no timely answer is filed, FHFA counsel of record may file a motion for entry of an order of default. Upon a finding that no good cause has been shown for the failure to file a timely answer, the presiding officer shall file with the Director a recommended decision containing the findings and the relief sought in the notice. Any final order issued by the Director based upon a respondent's failure to answer is deemed to be an order issued upon consent.

§ 1209.25 Amended pleadings.

(a) *Amendments.* The notice or answer may be amended or supplemented at any stage of the proceeding. The respondent must answer an amended notice within the time remaining for the respondent's answer to the original notice, or within 10 days after service of the amended notice, whichever period is longer, unless the Director or presiding officer orders otherwise for good cause shown.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, or as the presiding officer may allow for good cause shown, such issues will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice or answer, the presiding officer may admit the evidence when admission is likely to assist in adjudicating the merits of the action. The presiding officer will do so freely when the determination of the merits of the action is served thereby and the objecting party fails to satisfy the presiding officer that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The presiding officer may grant a continuance to enable the objecting party to meet such evidence.

§ 1209.26 Failure to appear.

Failure of a respondent to appear in person at the hearing or by a duly authorized representative of record constitutes a waiver of respondent's right to a hearing and is deemed an admission of the facts as alleged and consent to the relief sought in the notice. Without further proceedings or notice to the respondent, the presiding officer shall file with the Director a recommended decision containing the

Agency's findings and the relief sought in the notice.

§ 1209.27 Consolidation and severance of actions.

(a) *Consolidation.* On the motion of any party, or on the presiding officer's own motion, the presiding officer may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice. In the event of consolidation under this section, appropriate adjustment to the pre-hearing schedule must be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The presiding officer may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the presiding officer finds that undue prejudice or injustice to the moving party would result from not severing the proceeding and such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 1209.28 Motions.

(a) *In writing.* (1) Except as otherwise provided herein, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the presiding officer. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of or in opposition to a motion.

(b) *Oral motions.* A motion may be made orally on the record, unless the presiding officer directs that such motion be reduced to writing, in which case the motion will be subject to the requirements of this section.

(c) *Filing of motions.* Motions must be filed with the presiding officer and served on all parties; except that following the filing of a recommended decision, motions must be filed with the Director. Motions for pre-trial relief such as motions *in limine* or objections to offers of proof or experts shall be filed not less than 10 days prior to the date of the evidentiary hearing, except as provided with the consent of the presiding officer for good cause shown.

(d) *Responses and replies.* (1) Except as otherwise provided herein, any party may file a written response to a non-dispositive motion within 10 days after service of any written motion, or within such other period of time as may be established by the presiding officer or the Director; and the moving party may file a written reply to a written response to a non-dispositive motion within five days after the service of the response, unless some other period is ordered by the presiding officer or the Director. The presiding officer shall not rule on any oral or written motion before each party with an interest in the motion has had an opportunity to respond as provided in this section.

(2) The failure of a party to oppose a written motion or an oral motion made on the record is deemed as consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Dilatory motions.* Frivolous, dilatory, or substantively repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

(f) *Dispositive motions.* Dispositive motions are governed by §§ 1209.34 and 1209.35 of this part.

§ 1209.29 Discovery.

(a) *General rule.* (1) *Limits on discovery.* Subject to the limitations set out in paragraphs (a)(2), (b), (d), and (e) of this section, a party to a proceeding under this part may obtain document discovery by serving upon any other party in the proceeding a written request to produce documents. For purposes of such requests, the term ''documents'' may be defined to include records, drawings, graphs, charts, photographs, recordings, or data stored in electronic form or other data compilations from which information can be obtained or translated, if necessary, by the parties through detection devices into reasonably usable form (*e.g.,* electronically stored information), as well as written material of all kinds.

(2) *Discovery plan.* (i) In the initial scheduling conference held in accordance with § 1209.36, or otherwise at the earliest practicable time, the presiding officer shall require the parties to confer in good faith to develop and submit a joint discovery plan for the timely, cost-effective management of document discovery (including, if applicable, electronically stored information). The discovery plan should provide for the coordination of similar discovery requests by multiple parties, if any, and specify how costs are to be apportioned among those parties. The discovery plan shall specify the form of electronic productions, if any. Documents are to be produced in accordance with the technical specifications described in the discovery plan.

(ii) Discovery in the proceeding may commence upon the approval of the discovery plan by the presiding officer. Thereafter, the presiding officer may interpret or modify the discovery plan for good cause shown or in his or her discretion due to changed circumstances.

(iii) Nothing in paragraph (a)(2) of this section shall be interpreted or deemed to require the production of documents that are privileged or not reasonably accessible because of undue burden or cost, or to require any document production otherwise inconsistent with the limitations on discovery set forth in this part.

(b) *Relevance and scope.* (1) A party may obtain document discovery regarding any matter not privileged that is materially relevant to the charges or allowable defenses raised in the pending proceeding.

(2) The scope of available discovery shall be limited in accordance with subpart C of this part. Any request for the production of documents that seeks to obtain privileged information or documents not materially relevant under paragraph (b)(1) of this section, or that is unreasonable, oppressive, excessive in scope, unduly burdensome, cumulative, or repetitive of any prior discovery requests, shall be denied or modified.

(3) A request for document discovery is unreasonable, oppressive, excessive in scope, or unduly burdensome—and shall be denied or modified—if, among other things, the request:

(i) Fails to specify justifiable limitations on the relevant subject matter, time period covered, search parameters, or the geographic location(s) or data repositories to be searched;

(ii) Fails to identify documents with sufficient specificity;

(iii) Seeks material that is duplicative, cumulative, or obtainable from another source that is more accessible, cost-effective, or less burdensome;

(iv) Calls for the production of documents to be delivered to the requesting party or his or her designee and fails to provide a written agreement by the requestor to pay in advance for the costs of production in accordance with § 1209.30, or otherwise fails to take into account costs associated with processing electronically stored

information or any cost-sharing agreements between the parties;

(v) Fails to afford the responding party adequate time to respond; or

(vi) Fails to take into account retention policies or security protocols with respect to Federal information systems.

(c) *Forms of discovery.* Discovery shall be limited to requests for production of documents for inspection and copying. No other form of discovery shall be allowed. Discovery by use of interrogatories is not permitted. This paragraph shall not be interpreted to require the creation of a document.

(d) *Privileged matter.*—(1) *Privileged documents are not discoverable.* (i) Privileges include the attorney-client privilege, work-product privilege, any government's or government agency's deliberative process privilege, and any other privileges provided by the Constitution, any applicable act of Congress, or the principles of common law.

(ii) The parties may enter into a written agreement to permit a producing party to assert applicable privileges of a document even after its production and to request the return or destruction of privileged matter (claw back agreement). The parties shall file the claw back agreement with the presiding officer. To ensure the enforceability of the terms of any such claw back agreement, the presiding officer shall enter an order. Any party may petition the presiding officer for an order specifying claw back procedures for good cause shown.

(2) *No effect on examination authority.* The limitations on discoverable matter provided for in this part are not intended and shall not be construed to limit or otherwise affect the examination, regulatory or supervisory authority of FHFA.

(e) *Time limits.* All discovery matters, including all responses to discovery requests, shall be completed at least 20 days prior to the date scheduled for the commencement of the testimonial phase of the hearing. No exception to this discovery time limit shall be permitted, unless the presiding officer finds on the record that good cause exists for waiving the 20-day requirement of this paragraph.

(f) *Production.* Documents must be produced as they are kept in the usual course of business, or labeled and organized to correspond with the categories in the request, or otherwise produced in a manner determined by mutual agreement between the requesting party and the party or non-party to whom the request is directed in accordance with this part.

§ 1209.30 Request for document discovery from parties.

(a) *General rule.* Each request for the production of documents must conform to the requirements of this part.

(1) *Limitations.* Subject to applicable limitations on discovery in this part, a party may serve (requesting party) a request on another party (responding party) for the production of any non-privileged, discoverable documents in the possession, custody, or control of the responding party. A requesting party shall serve a copy of any such document request on all other parties. Each request for the production of documents must, with reasonable particularity, identify or describe the documents to be produced, either by individual item or by category, with sufficient specificity to enable the responding party to respond consistent with the requirements of this part.

(2) *Discovery plan.* Document discovery under subpart C of this part shall be consistent with any discovery plan approved by the presiding officer under § 1209.29.

(b) *Production and costs.*—(1) *General rule.* Subject to the applicable limitations on discovery in this part and the discovery plan, the requesting party shall specify a reasonable time, place, and manner for the production of documents and the performance of any related acts. The responding party shall produce documents to the requesting party in a manner consistent with the discovery plan.

(2) *Costs.* All costs associated with document productions—including, without limitation, photocopying (as specified in paragraph (b)(4) of this section) or electronic processing (as specified in paragraph (b)(5) of this section)—shall be born by the requesting party, or otherwise in accordance with any discovery plan approved by the presiding officer that may require such costs be apportioned between parties, or as otherwise ordered by the presiding officer. If consistent with the discovery plan approved by the presiding officer, the responding party may require receipt of payment of any such document production costs in advance before any such production of responsive documents.

(3) *Organization.* Unless otherwise provided for in any discovery plan approved by the presiding officer under § 1209.29 of this part, or by order of the presiding officer, documents must be produced as they are kept in the usual course of business or they shall be labeled and organized to correspond with the categories in the document request.

(4) *Photocopying charges.* Photocopying charges are to be set at the current rate per page imposed by FHFA under the fee schedule pursuant to § 1202.11(c) of this part for requests for documents filed under the Freedom of Information Act, 5 U.S.C. 552.

(5) *Electronic processing.* In the event that any party seeks the production of electronically stored information (*i.e.,* information created, stored, communicated, or used in digital format requiring the use of computer hardware and software), the parties shall confer in good faith to resolve common discovery issues related to electronically stored information, such as preservation, search methodology, collection, and need for such information; the suitability of alternative means to obtain it; and the format of production. Consistent with the discovery plan approved by the presiding officer under § 1209.29, costs associated with the processing of such electronic information (*i.e.,* imaging; scanning; conversion of ''native'' files to images that are viewable and searchable; indexing; coding; database or Web-based hosting; searches; branding of endorsements, such as ''confidential'' or document control numbering; privilege reviews; and copies of production discs) and delivery of any such document production, shall be born by the requesting party, apportioned among the parties, or as otherwise ordered by the presiding officer. Nothing in this part shall be deemed to require FHFA to produce privileged documents or any electronic records in violation of applicable Federal law or security protocols.

(c) *Obligation to update responses.* A party who has responded to a discovery request is not required to supplement the response, unless:

(1) The responding party learns that in some material respect the information disclosed is incomplete or incorrect, and

(2) The additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(d) *Motions to strike or limit discovery requests.* (1) Any party served with a document discovery request may object within 30 days of service of the request by filing a motion to strike or limit the request in accordance with the provisions of § 1209.28 of this part. No other party may file an objection. If an objection is made only to a portion of an item or category in a request, the objection shall specify that portion. Any objections not made in accordance with this paragraph and § 1209.28 are waived.

(2) The party who served the request that is the subject of a motion to strike

or limit may file a written response in accordance with the provisions of § 1209.28. A reply by the moving party, if any, shall be governed by § 1209.28. No other party may file a response.

(e) *Privilege.* At the time other documents are produced, all documents withheld on a claim of privilege must be reasonably identified, together with a statement of the basis for the assertion of privilege on a privilege log. When similar documents that are protected by the government's deliberative process, investigative or examination privilege, the attorney work-product doctrine, or the attorney-client privilege are voluminous, such documents may be identified on the log by category instead of by individual document. The presiding officer has discretion to permit submission of a privilege log subsequent to the document production(s), which may occur on a rolling basis if agreed to by the parties in the discovery plan, and to determine whether an identification by category is sufficient to provide notice of withheld documents.

(f) *Motions to compel production.* (1) If a party withholds any document as privileged or fails to comply fully with a document discovery request, the requesting party may, within 10 days of the assertion of privilege or of the time the failure to comply becomes known to the requesting party, file a motion in accordance with the provisions of § 1209.28 for the issuance of a subpoena compelling the production of any such document.

(2) The party who asserted the privilege or failed to comply with the request may, within five days of service of a motion for the issuance of a subpoena compelling production, file a written response to the motion. No other party may file a response.

(g) *Ruling on motions.*—(1) *Appropriate protective orders.* After the time for filing a response to a motion to compel pursuant to this section has expired, the presiding officer shall rule promptly on any such motion. The presiding officer may deny, grant in part, or otherwise modify any request for the production of documents, if he determines that a discovery request, or any one or more of its terms, seeks to obtain the production of documents that are privileged or otherwise not within the scope of permissible discovery under § 1209.29(b), and may issue appropriate protective orders, upon such conditions as justice may require.

(2) *No stay.* The pendency of a motion to strike or limit discovery, or to compel the production of any document, shall not stay or continue the proceeding, unless otherwise ordered by the presiding officer. Notwithstanding any other provision in this part, the presiding officer may not release, or order any party to produce, any document withheld on the basis of privilege, if the withholding party has stated to the presiding officer its intention to file with the Director a timely motion for interlocutory review of the presiding officer's privilege determination or order to produce the documents, until the Director has rendered a decision on the motion for interlocutory review.

(3) *Interlocutory review by the Director.* Interlocutory review of a privilege determination or document discovery subpoena of the presiding officer shall be in accordance with § 1209.33. To the extent necessary to rule promptly on such matters, the Director may request that the presiding officer provide additional information from the record. As provided by § 1209.33 of this part, a pending interlocutory review of a privilege determination or document discovery subpoena shall not stay the proceedings, unless otherwise ordered by the presiding officer or the Director.

(h) *Enforcement of document discovery subpoenas.*—(1) *Authority.* If the presiding officer or Director issues a subpoena compelling production of documents by a party in a proceeding under this part, in the event of noncompliance with the subpoena and to the extent authorized by section 1379D(c)(1) of the Safety and Soundness Act (12 U.S.C. 4641(c)(1)), the Director or the subpoenaing party may apply to the appropriate United States district court for an order requiring compliance with the subpoena.

(2) *United States district court jurisdiction.* As provided by section 1379D(c)(2) of the Safety and Soundness Act (12 U.S.C. 4641(c)(2)), the appropriate United States district court has the jurisdiction and power to order and to require compliance with any discovery subpoena issued under this part.

(3) *No stay; sanctions.* The judicial enforcement of a discovery subpoena shall not operate as a stay of the proceedings, unless the presiding officer or the Director orders a stay of such duration as the presiding officer or Director may find reasonable and in the best interest of the parties or as justice may require. A party's right to seek judicial enforcement of a subpoena shall not in any manner limit the sanctions that may be imposed by the presiding officer or Director against a party who fails to produce or induces another to fail to produce subpoenaed documents.

§ 1209.31 Document discovery subpoenas to non-parties.

(a) *General rules.*—(1) *Application for subpoena.* As provided under this part, any party may apply to the presiding officer for the issuance of a document discovery subpoena addressed to any person who is not a party to the proceeding. The application must contain the proposed document subpoena, and a brief statement of facts demonstrating that the documents are materially relevant to the charges and issues presented in the proceeding and the reasonableness of the scope of the document request. The subpoenaing party shall specify a reasonable time, place, and manner for production in response to the subpoena, and state its unequivocal intention to pay for the production of the documents as provided in this part.

(2) *Service of subpoena.* A party shall apply for a document subpoena under this section only within the time period during which such party could serve a discovery request under § 1209.30 of this part. The party obtaining the document subpoena is responsible for serving it on the subpoenaed person and for serving copies on all other parties. Document subpoenas may be served in the District of Columbia, or any State, Territory, possession, or other place subject to the jurisdiction of the United States, or as otherwise provided by law.

(3) *Presiding officer's discretion.* The presiding officer shall issue promptly any document subpoena applied for under this section subject to the application conditions set forth in this section and his or her discretion. If the presiding officer determines that the application does not set forth a valid basis for the issuance of the requested document subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, unduly burdensome, or otherwise objectionable under § 1209.29(b), he may refuse to issue the requested document subpoena or may issue it in a modified form upon such additional conditions as may be determined by the presiding officer.

(b) *Motion to quash or modify.*—(1) *Limited appearance.* Any non-party to a pending proceeding to whom a document subpoena is directed may enter a limited appearance, through a representative or on his or her own behalf, before the presiding officer to file with the presiding officer a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena.

(2) *Objections.* Any motion to quash or modify a document subpoena must be filed on the same basis, including the assertion of any privileges, upon which

a party could object to a discovery document request under § 1209.30 and during the same time limits during which such an objection could be filed.

(3) *Responses and replies.* The party who obtained the subpoena may respond to such motion within 10 days of service of the motion; the response shall be served on the non-party in accordance with this part. Absent express leave of the presiding officer, no other party may respond to the non-party's motion. The non-party may file a reply within five days of service of a response.

(4) *No stay.* A non-party's right to seek to quash or modify a document subpoena shall not stay the proceeding, or limit in any manner the sanctions that may be imposed by the presiding officer against a party who induces another to fail to produce any such subpoenaed documents. No party may rely upon the pendency of a non-party's motion to quash or modify a document subpoena to excuse performance of any action required of that party under this part.

(c) *Enforcing document subpoenas to non-parties.*—(1) *Application for enforcement of subpoena.* If a non-party fails to comply with any subpoena issued pursuant to this section or with any order of the presiding officer that directs compliance with all or any portion of a document subpoena issued pursuant to this section, the subpoenaing party or any other aggrieved party to the proceeding may, to the extent authorized by section 1379D(c) of the Safety and Soundness Act (12 U.S.C. 4641(c)), apply to an appropriate United States district court for an order requiring compliance with the subpoena.

(2) *No stay.* A party's right to seek district court enforcement of a non-party document production subpoena under this section shall not automatically stay an enforcement proceeding under of the Safety and Soundness Act.

(3) *Sanctions.* A party's right to seek district court enforcement of a non-party document subpoena shall in no way limit the sanctions that may be imposed by the presiding officer on a party who induces another to fail to comply with any subpoena issued under this section.

§ 1209.32 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness's testimony for the record may apply to the presiding officer in accordance with the procedures set forth in paragraph (a)(2) of this section for the issuance of a subpoena or subpoena *duces tecum* requiring attendance of the witness at a deposition for the purpose of preserving that witness's testimony. The presiding officer may issue a deposition subpoena under this section upon a showing that:

(i) The witness will be unable to attend or may be prevented from attending the testimonial phase of the hearing because of age, sickness, or infirmity, or will be otherwise unavailable;

(ii) The subpoenaing party did not cause or contribute to the unavailability of the witness for the hearing;

(iii) The witness has personal knowledge and the testimony is reasonably expected to be materially relevant to claims, defenses, or matters determined to be at issue in the proceeding; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) The application must contain a proposed deposition subpoena and a brief statement of the reasons for the issuance of the subpoena. The subpoena must name the witness whose deposition is to be taken and specify the time and place for taking the deposition. A deposition subpoena may require the witness to be deposed anywhere within the United States, or its Territories and possessions, in which that witness resides or has a regular place of employment or such other convenient place as the presiding officer shall fix.

(3) Subpoenas must be issued promptly upon request, unless the presiding officer determines that the request fails to set forth a valid basis under this section for its issuance. Before making a determination that there is no valid basis for issuing the subpoena, the presiding officer shall require a written response from the party requesting the subpoena or require attendance at a conference to determine whether there is a valid basis upon which to issue the requested subpoena.

(4) The party obtaining a deposition subpoena is responsible for serving it on the witness and for serving copies on all parties. Unless the presiding officer orders otherwise, no deposition under this section shall be taken on fewer than 10 days' notice to the witness and all parties. Deposition subpoenas may be served anywhere within the United States or its Territories and possessions, or on any person doing business anywhere within the United States or its Territories and possessions, or as otherwise permitted by law.

(b) *Objections to deposition subpoenas.* (1) The witness and any party who has not had an opportunity to oppose a deposition subpoena issued under this section may file a motion with the presiding officer under § 1209.28 of this part to quash or modify the subpoena prior to the time for compliance specified in the subpoena, but not more than 10 days after service of the subpoena.

(2) A statement of the basis for the motion to quash or modify a subpoena issued under this section must accompany the motion. The motion must be served on all parties.

(c) *Procedure upon deposition.* (1) Each witness testifying pursuant to a deposition subpoena must be duly sworn and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Failure to object to questions or documents is not deemed a waiver except where the ground for objection might have been avoided if the objection had been presented timely. All questions, answers, and objections must be recorded and transcribed. Videotaped depositions must be transcribed for the record; copies and transcriptions must be supplied to each party.

(2) Any party may move before the presiding officer for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence that, during the deposition, the witness has refused to submit.

(3) The deposition transcript must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(d) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or with any order of the presiding officer made upon motion under paragraph (c)(2) of this section, the subpoenaing party or other aggrieved party may, to the extent authorized by section 1379D(c) of the Safety and Soundness Act (12 U.S.C. 4641(c)), apply to an appropriate United States district court for an order requiring compliance with the portions of the subpoena that the presiding officer has ordered enforced. A party's right to seek court enforcement of a deposition subpoena in no way limits the sanctions that may be imposed by the presiding officer on a party who fails to comply with or induces a failure to comply with a subpoena issued under this section.

§ 1209.33 Interlocutory review.

(a) *General rule.* The Director may review a ruling of the presiding officer prior to the certification of the record to the Director only in accordance with the procedures set forth in this section.

(b) *Scope of review.* The Director may exercise interlocutory review of a ruling of the presiding officer if the Director finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

(c) *Procedure.* Any motion for interlocutory review shall be filed by a party with the presiding officer within 10 days of his or her ruling. Upon the expiration of the time for filing all responses, the presiding officer shall refer the matter to the Director for final disposition. In referring the matter to the Director, the presiding officer may indicate agreement or disagreement with the asserted grounds for interlocutory review of the ruling in question.

(d) *Suspension of proceeding.* Neither a request for interlocutory review nor any disposition of such a request by the Director under this section suspends or stays the proceeding unless otherwise ordered by the presiding officer or the Director.

§ 1209.34 Summary disposition.

(a) *In general.* The presiding officer shall recommend that the Director issue a final order granting a motion for summary disposition if the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The movant is entitled to a decision in its favor as a matter of law.

(b) *Filing of motions and responses.* (1) Any party who believes there is no genuine issue of material fact to be determined and that such party is entitled to a decision as a matter of law may move at any time for summary disposition in its favor of all or any part of the proceeding. Any party, within 30 days after service of such motion or within such time period as allowed by the presiding officer, may file a response to such motion.

(2) A motion for summary disposition must be accompanied by a statement of material facts as to which the movant contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits, and any other evidentiary materials that the movant contends support its position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the movant. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which the party contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as that submitted with the motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(c) *Hearing on motion.* At the request of any party or on his or her own motion, the presiding officer may hear oral argument on the motion for summary disposition.

(d) *Decision on motion.* Following receipt of a motion for summary disposition and all responses thereto, the presiding officer shall determine whether the movant is entitled to summary disposition. If the presiding officer determines that summary disposition is warranted, the presiding officer shall submit a recommended decision to that effect to the Director, under § 1209.53. If the presiding officer finds that the moving party is not entitled to summary disposition, the presiding officer shall make a ruling denying the motion.

§ 1209.35 Partial summary disposition.

If the presiding officer determines that a party is entitled to summary disposition as to certain claims only, he shall defer submitting a recommended decision to the Director as to those claims. A hearing on the remaining issues must be ordered. Those claims for which the presiding officer has determined that summary disposition is warranted will be addressed in the recommended decision filed at the conclusion of the hearing.

§ 1209.36 Scheduling and pre-hearing conferences.

(a) *Scheduling conference.* After service of a notice of charges commencing a proceeding under this part, the presiding officer shall order the representative(s) of record for each party, and any party not so represented who is appearing *pro se,* to meet in person or to confer by telephone at a specified time within 30 days of service of such notice for the purpose of setting the time and place of the testimonial hearing on the record to be held within the District of Columbia and scheduling the course and conduct of the proceeding (the ''scheduling conference''). The identification of potential witnesses, the time for and manner of discovery, and the exchange of any pre-hearing materials including witness lists, statements of issues, stipulations, exhibits, and any other materials also may be determined at the scheduling conference.

(b) *Pre-hearing conferences.* The presiding officer may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct representatives for the parties to meet with (in person or by telephone) at a pre-hearing conference to address any or all of the following:

(1) Simplification and clarification of the issues;

(2) Stipulations, admissions of fact and the contents, authenticity and admissibility into evidence of documents;

(3) Matters of which official notice may be taken;

(4) Limitation of the number of witnesses;

(5) Summary disposition of any or all issues;

(6) Resolution of discovery issues or disputes;

(7) Amendments to pleadings; and

(8) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The presiding officer, in his or her discretion, may require that a scheduling or pre-hearing conference be recorded by a court reporter. Any transcript of the conference and any materials filed, including orders, become part of the record of the proceeding. A party may obtain a copy of a transcript at such party's expense.

(d) *Scheduling or pre-hearing orders.* Within a reasonable time following the conclusion of the scheduling conference or any pre-hearing conference, the presiding officer shall serve on each party an order setting forth any agreements reached and any procedural determinations made.

§ 1209.37 Pre-hearing submissions.

(a) *General.* Within the time set by the presiding officer, but in no case later than 10 days before the start of the

hearing, each party shall serve on every other party the serving party's:

(1) Pre-hearing statement;

(2) Final list of witnesses to be called to testify at the hearing, including name and address of each witness, and a short summary of the expected testimony of each witness;

(3) List of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(4) Stipulations of fact, if any.

(b) *Effect of failure to comply.* No witness may testify and no exhibit may be introduced at the hearing that is not listed in the pre-hearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 1209.38 Hearing subpoenas.

(a) *Issuance.* (1) Upon application of a party to the presiding officer showing relevance and reasonableness of scope of the testimony or other evidence sought, the presiding officer may issue a subpoena or a subpoena *duces tecum* requiring the attendance of a witness at the hearing or the production of documentary or physical evidence at such hearing. The application for a hearing subpoena must also contain a proposed subpoena specifying the attendance of a witness or the production of evidence from any place within the United States or its territories and possessions, or as otherwise provided by law, at the designated place where the hearing is being conducted. The party making the application shall serve a copy of the application and the proposed subpoena on every other party.

(2) A party may apply for a hearing subpoena at any time before the commencement of or during a hearing. During a hearing, a party may make an application for a subpoena orally on the record before the presiding officer.

(3) The presiding officer shall promptly issue any hearing subpoena applied for under this section; except that, if the presiding officer determines that the application does not set forth a valid basis for the issuance of the subpoena, or that any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena or may issue the subpoena in a modified form upon any conditions consistent with subpart C of this part. Upon issuance by the presiding officer, the party making the application shall serve the subpoena on the person named in the subpoena and on each party.

(b) *Motion to quash or modify.* (1) Any person to whom a hearing subpoena is directed or any party may file a motion to quash or modify such subpoena, accompanied by a statement of the basis for quashing or modifying the subpoena. The movant must serve the motion on each party and on the person named in the subpoena. Any party may respond to the motion within 10 days of service of the motion.

(2) Any motion to quash or modify a hearing subpoena must be filed prior to the time specified in the subpoena for compliance, but no more than 10 days after the date of service of the subpoena upon the movant.

(c) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the presiding officer that directs compliance with all or any portion of a hearing subpoena, the subpoenaing party or any other aggrieved party may seek enforcement of the subpoena pursuant to § 1209.31. A party's right to seek court enforcement of a hearing subpoena shall in no way limit the sanctions that may be imposed by the presiding officer on a party who induces a failure to comply with subpoenas issued under this section.

§§ 1209.39 through 1209.49 [Reserved].

§ 1209.50 Conduct of hearings.

(a) *General rules.*—(1) *Conduct.* Hearings shall be conducted in accordance with chapter 5 of Title 5 and other applicable law and so as to provide a fair and expeditious presentation of the relevant disputed issues. Except as limited by this subpart, each party has the right to present its case or defense by oral and documentary evidence and to conduct such cross examination as may be required for full disclosure of the facts.

(2) *Order of hearing.* FHFA counsel of record shall present its case-in-chief first, unless otherwise ordered by the presiding officer or unless otherwise expressly specified by law or regulation. FHFA counsel of record shall be the first party to present an opening statement and a closing statement and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to the order of presentation of their cases, but if they do not agree, the presiding officer shall fix the order.

(3) *Examination of witnesses.* Only one representative for each party may conduct an examination of a witness, except that in the case of extensive direct examination, the presiding officer may permit more than one representative for the party presenting the witness to conduct the examination. A party may have one representative conduct the direct examination and another representative conduct re-direct examination of a witness, or may have one representative conduct the cross examination of a witness and another representative conduct the re-cross examination of a witness.

(4) *Stipulations.* Unless the presiding officer directs otherwise, all documents that the parties have stipulated as admissible shall be admitted into evidence upon commencement of the hearing.

(b) *Transcript.* The hearing shall be recorded and transcribed. The transcript shall be made available to any party upon payment of the cost thereof. The presiding officer shall have authority to order the record corrected, either upon motion to correct, upon stipulation of the parties, or following notice to the parties upon the presiding officer's own motion.

§ 1209.51 Evidence.

(a) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act (5 U.S.C. 552 *et seq.*) and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to subpart C of this part.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to subpart C of this part if such evidence is relevant, material, probative and reliable, and not unduly repetitive.

(b) *Official notice.* (1) Official notice may be taken of any material fact that may be judicially noticed by a United States district court and of any materially relevant information in the official public records of any Federal or State government agency.

(2) All matters officially noticed by the presiding officer or the Director shall appear on the record.

(3) If official notice is requested of any material fact, the parties, upon timely request, shall be afforded an opportunity to object.

(c) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (a)(1) of this section, any document, including a report of examination, oversight activity,

inspection, or visitation prepared by FHFA or by another Federal or State financial institution's regulatory agency, is admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines, or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the presiding officer's discretion, be used with or without being admitted into evidence.

(d) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear in the record.

(2) When an objection to a question or line of questioning is sustained, the examining representative of record may make a specific proffer on the record of what he or she expected to prove by the expected testimony of the witness. The proffer may be by representation of the representative or by direct interrogation of the witness.

(3) The presiding officer shall retain rejected exhibits, adequately marked for identification, for the record and transmit such exhibits to the Director.

(4) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(e) *Stipulations.* The parties may stipulate as to any relevant matters of fact or the authentication of any document to be admitted into evidence. Such stipulations must be received in evidence at a hearing, are binding on the parties with respect to the matters stipulated, and shall be made part of the record.

(f) *Depositions of unavailable witnesses.* (1) If a witness is unavailable to testify at a hearing and that witness has testified in a deposition in accordance with § 1209.32, a party may offer as evidence all or any part of the transcript of the deposition, including deposition exhibits, if any.

(2) Such deposition transcript is admissible to the same extent that testimony would have been admissible had that person testified at the hearing, provided that if a witness refused to answer proper questions during the deposition the presiding officer may, on that basis, limit the admissibility of the deposition in any manner that justice requires.

(3) Only those portions of a deposition or related exhibits received in evidence at the hearing in accordance with this section shall constitute a part of the record.

§ 1209.52 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the presiding officer shall serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed with the presiding officer. Any party may file with the presiding officer proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days after the parties have received notice that the transcript has been filed with the presiding officer, unless otherwise ordered by the presiding officer.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page and line references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document.

(3) A party is deemed to have waived any issue not raised in proposed findings or conclusions timely filed by that party.

(b) *Reply briefs.* Reply briefs may be filed within 15 days after the date on which the parties' proposed findings and conclusions and proposed order are due. Reply briefs shall be limited strictly to responding to new matters, issues, or arguments raised by another party in papers filed in the proceeding. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a reply brief.

(c) *Simultaneous filing required.* The presiding officer shall not order the filing by any party of any brief or reply brief supporting proposed findings and conclusions in advance of the other party's filing of its brief.

§ 1209.53 Recommended decision and filing of record.

(a) *Filing of recommended decision and record.* Within 45 days after expiration of the time allowed for filing reply briefs under § 1209.52(b), the presiding officer shall file with and certify to the Director, for decision, the record of the proceeding. The record must include the presiding officer's recommended decision, recommended findings of fact and conclusions of law, and proposed order; all pre-hearing and hearing transcripts, exhibits and rulings; and the motions, briefs, memoranda, and other supporting papers filed in connection with the hearing. The presiding officer shall serve upon each party the recommended decision, recommended findings and conclusions, and proposed order.

(b) *Filing of index.* At the same time the presiding officer files with and certifies to the Director, for final determination, the record of the proceeding, the presiding officer shall furnish to the Director a certified index of the entire record of the proceeding. The certified index shall include, at a minimum, an entry for each paper, document or motion filed with the presiding officer in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for: each exhibit introduced and admitted into evidence at the hearing; each exhibit introduced but not admitted into evidence at the hearing; each exhibit introduced and admitted into evidence after the completion of the hearing; and each exhibit introduced but not admitted into evidence after the completion of the hearing.

§ 1209.54 Exceptions to recommended decision.

(a) *Filing exceptions.* Within 30 days after service of the recommended decision, recommended findings and conclusions, and proposed order under § 1209.53, a party may file with the Director written exceptions to the presiding officer's recommended decision, recommended findings and conclusions, and proposed order; to the admission or exclusion of evidence; or to the failure of the presiding officer to make a ruling proposed by a party. A supporting brief may be filed at the time the exceptions are filed, either as part of the same document or in a separate document.

(b) *Effect of failure to file or raise exceptions.* (1) Failure of a party to file exceptions to those matters specified in paragraph (a) of this section within the time prescribed is deemed a waiver of objection thereto.

(2) No exception need be considered by the Director if the party taking exception had an opportunity to raise the same objection, issue, or argument before the presiding officer and failed to do so.

(c) *Contents.* (1) All exceptions and briefs in support of such exceptions must be confined to the particular matters in or omissions from the presiding officer's recommendations to which that party takes exception.

(2) All exceptions and briefs in support of exceptions must set forth page or paragraph references to the specific parts of the presiding officer's recommendations to which exception is

taken, the page or paragraph references to those portions of the record relied upon to support each exception, and the legal authority relied upon to support each exception. Exceptions and briefs in support shall not exceed a total of 30 pages, except by leave of the Director on motion.

(3) One reply brief may be submitted by each party opposing the exceptions within 10 days of service of exceptions and briefs in support of exceptions. Reply briefs shall not exceed 15 pages, except by leave of the Director on motion.

§ 1209.55 Review by Director.

(a) *Notice of submission to the Director.* When the Director determines that the record in the proceeding is complete, the Director shall serve notice upon the parties that the case has been submitted to the Director for final decision.

(b) *Oral argument before the Director.* Upon the initiative of the Director or on the written request of any party filed with the Director within the time for filing exceptions, the Director may order and hear oral argument on the recommended findings, conclusions, decision and order of the presiding officer. A written request by a party must show good cause for oral argument and state reasons why arguments cannot be presented adequately in writing. A denial of a request for oral argument may be set forth in the Director's final decision. Oral argument before the Director must be transcribed.

(c) *Director's final decision and order.* (1) Decisional employees may advise and assist the Director in the consideration and disposition of the case. The final decision of the Director will be based upon review of the entire record of the proceeding, except that the Director may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties.

(2) The Director shall render a final decision and issue an appropriate order within 90 days after notification to the parties that the case has been submitted for final decision, unless the Director orders that the action or any aspect thereof be remanded to the presiding officer for further proceedings. Copies of the final decision including findings of fact and an appropriate order of the Director shall be served upon each party to the proceeding and as otherwise required by statute.

(3) The Director may modify, terminate, or set aside an order in accordance with section 1373(b)(2) of the Safety and Soundness Act (12 U.S.C. 4633(b)(2)).

§ 1209.56 Exhaustion of administrative remedies.

To exhaust administrative remedies as to any issue on which a party disagrees with the presiding officer's recommendations, a party must file exceptions with the Director under § 1209.54 of this part. A party must exhaust administrative remedies as a precondition to seeking judicial review of any final decision and order issued under this part.

§ 1209.57 Judicial review; no automatic stay.

(a) *Judicial review.* Judicial review of any final order of the Director shall be exclusively as provided by section 1374 of the Safety and Soundness Act (12 U.S.C. 4634).

(b) *No automatic stay.* Commencement of proceedings for judicial review of a final decision and order of the Director may not, unless specifically ordered by the Director or a reviewing court, operate as a stay of any order issued by the Director. The Director may, in his or her discretion and on such terms as he finds just, stay the effectiveness of all or any part of an order of the Director pending a final decision on a petition for review of that order.

§§ 1209.58 through 1209.69 [Reserved].

Subpart D—Parties and Representational Practice Before the Federal Housing Finance Agency; Standards of Conduct

§ 1209.70 Scope.

Subpart D of this part contains rules governing practice by parties or their representatives before FHFA. This subpart addresses the imposition of sanctions by the presiding officer or the Director against parties or their representatives in an adjudicatory proceeding under this part. This subpart also covers other disciplinary sanctions—censure, suspension, or disbarment—against individuals who appear before FHFA in a representational capacity either in an adjudicatory proceeding under this part or in any other matters connected with presentations to FHFA relating to a client's or other principal's rights, privileges, or liabilities. This representation includes, but is not limited to, the practice of attorneys and accountants. Employees of FHFA are not subject to disciplinary proceedings under this subpart.

§ 1209.71 Definitions.

Practice before FHFA for the purposes of subpart D of this part, includes, but is not limited to, transacting any business with FHFA as counsel of record, representative, or agent for any other person, unless the Director orders otherwise. Practice before FHFA also includes the preparation of any statement, opinion, or other paper by a counsel, representative or agent that is filed with FHFA in any certification, notification, application, report, or other document, with the consent of such counsel, representative, or agent. Practice before FHFA does not include work prepared for a regulated entity or entity-affiliated party solely at the request of such party for use in the ordinary course of its business.

§ 1209.72 Appearance and practice in adjudicatory proceedings.

(a) *Appearance before FHFA or a presiding officer.*—(1) *By attorneys.* A party may be represented by an attorney who is a member in good standing of the bar of the highest court of any State, commonwealth, possession or territory of the United States, or the District of Columbia, and who is not currently suspended or disbarred from practice before FHFA.

(2) *By non-attorneys.* An individual may appear on his or her own behalf, *pro se.* A member of a partnership may represent the partnership and a duly authorized officer, director, employee, or other agent of any corporation or other entity not specifically listed herein may represent such corporation or other entity; provided that such officer, director, employee, or other agent is not currently suspended or disbarred from practice before FHFA. A duly authorized officer or employee of any Government unit, agency, or authority may represent that unit, agency, or authority.

(b) *Notice of appearance.* Any person appearing in a representative capacity on behalf of a party, including FHFA, shall execute and file a notice of appearance with the presiding officer at or before the time such person submits papers or otherwise appears on behalf of a party in the adjudicatory proceeding. Such notice of appearance shall include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party. By filing a notice of appearance on behalf of a party in an adjudicatory proceeding, the representative thereby agrees and represents that he is authorized to accept service on behalf of the represented party and that, in the event

of withdrawal from representation, he or she will, if required by the presiding officer, continue to accept service until a new representative has filed a notice of appearance or until the represented party indicates that he or she will proceed on a *pro se* basis. Unless the representative filing the notice is an attorney, the notice of appearance shall also be executed by the person represented or, if the person is not an individual, by the chief executive officer, or duly authorized officer of that person.

§ 1209.73 Conflicts of interest.

(a) *Conflict of interest in representation.* No representative shall represent another person in an adjudicatory proceeding if it reasonably appears that such representation may be limited materially by that representative's responsibilities to a third person or by that representative's own interests. The presiding officer may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel or other representative represents two or more parties to an adjudicatory proceeding, or also represents a non-party on a matter relevant to an issue in the proceeding, that representative must certify in writing at the time of filing the notice of appearance required by § 1209.72 of this part as follows:

(1) That the representative has personally and fully discussed the possibility of conflicts of interest with each affected party and non-party; and

(2) That each affected party and non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any non-material conflicts of interest during the course of the proceeding.

§ 1209.74 Sanctions.

(a) *General rule.* Appropriate sanctions may be imposed during the course of any proceeding when any party or representative of record has acted or failed to act in a manner required by applicable statute, regulation, or order, and that act or failure to act:

(1) Constitutes contemptuous conduct, which includes dilatory, obstructionist, egregious, contumacious, unethical, or other improper conduct at any phase of any proceeding, hearing, or appearance before a presiding officer or the Director;

(2) Has caused some other party material and substantive injury, including, but not limited to, incurring expenses including attorney's fees or experiencing prejudicial delay;

(3) Is a clear and unexcused violation of an applicable statute, regulation, or order; or

(4) Has delayed the proceeding unduly.

(b) *Sanctions.* Sanctions that may be imposed include, but are not limited to, any one or more of the following:

(1) Issuing an order against a party;

(2) Rejecting or striking any testimony or documentary evidence offered, or other papers filed, by the party;

(3) Precluding the party from contesting specific issues or findings;

(4) Precluding the party from offering certain evidence or from challenging or contesting certain evidence offered by another party;

(5) Precluding the party from making a late filing or conditioning a late filing on any terms that may be just; or

(6) Assessing reasonable expenses, including attorney's fees, incurred by any other party as a result of the improper action or failure to act.

(c) *Procedure for imposition of sanctions.* (1) The presiding officer, on the motion of any party, or on his or her own motion, and after such notice and responses as may be directed by the presiding officer, may impose any sanction authorized by this section. The presiding officer shall submit to the Director for final ruling any sanction that would result in a final order that terminates the case on the merits or is otherwise dispositive of the case.

(2) Except as provided in paragraph (d) of this section, no sanction authorized by this section, other than refusing to accept late papers, shall be imposed without prior notice to all parties and an opportunity for any representative or party against whom sanctions may be imposed to be heard. The presiding officer shall determine and direct the appropriate notice and form for such opportunity to be heard. The opportunity to be heard may be limited to an opportunity to respond verbally immediately after the act or inaction in question is noted by the presiding officer.

(3) For purposes of interlocutory review, motions for the imposition of sanctions by any party and the imposition of sanctions shall be treated the same as motions for any other ruling by the presiding officer.

(4) Nothing in this section shall be read to preclude the presiding officer or the Director from taking any other action or imposing any other restriction or sanction authorized by any applicable statute or regulation.

(d) *Sanctions for contemptuous conduct.* If, during the course of any proceeding, a presiding officer finds any representative or any individual representing themself to have engaged in contemptuous conduct, the presiding officer may summarily suspend that individual from participating in that or any related proceeding or impose any other appropriate sanction.

§ 1209.75 Censure, suspension, disbarment, and reinstatement.

(a) *Discretionary censure, suspension, and disbarment.* (1) The Director may censure any individual who practices or attempts to practice before FHFA or suspend or revoke the privilege to appear or practice before FHFA of such individual if, after notice of and opportunity for hearing in the matter, that individual is found by the Director—

(i) Not to possess the requisite qualifications or competence to represent others;

(ii) To be seriously lacking in character or integrity or to have engaged in material unethical or improper professional conduct;

(iii) To have caused unfair and material injury or prejudice to another party, such as prejudicial delay or unnecessary expenses including attorney's fees;

(iv) To have engaged in, or aided and abetted, a material and knowing violation of the Safety and Soundness Act, the Federal Home Loan Mortgage Corporation Act, the Federal National Mortgage Association Charter Act, or the rules or regulations issued under those statutes, or any other applicable law or regulation;

(v) To have engaged in contemptuous conduct before FHFA;

(vi) With intent to defraud in any manner, to have willfully and knowingly deceived, misled, or threatened any client or prospective client; or

(vii) Within the last 10 years, to have been convicted of an offense involving moral turpitude, dishonesty, or breach of trust, if the conviction has not been reversed on appeal. A conviction within the meaning of this paragraph shall be deemed to have occurred when the convicting court enters its judgment or order, regardless of whether an appeal is pending or could be taken and includes a judgment or an order on a plea of *nolo contendere* or on consent, regardless of whether a violation is admitted in the consent.

(2) Suspension or revocation on the grounds set forth in paragraphs (a)(1)(ii) through (vii) of this section shall only be ordered upon a further finding that the individual's conduct or character was sufficiently egregious as to justify suspension or revocation. Suspension or disbarment under this paragraph shall continue until the applicant has been reinstated by the Director for good cause shown or until, in the case of a suspension, the suspension period has expired.

(3) If the final order against the respondent is for censure, the individual may be permitted to practice before FHFA, but such individual's future representations may be subject to conditions designed to promote high standards of conduct. If a written letter of censure is issued, a copy will be maintained in FHFA's files.

(b) *Mandatory suspension and disbarment.* (1) Any counsel who has been and remains suspended or disbarred by a court of the United States or of any State, commonwealth, possession or territory of the United States, or the District of Columbia; any accountant or other licensed expert whose license to practice has been revoked in any State, commonwealth, possession or territory of the United States, or the District of Columbia; any person who has been and remains suspended or barred from practice by or before the Department of Housing and Urban Development, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Housing Finance Board, the Farm Credit Administration, the Securities and Exchange Commission, or the Commodity Futures Trading Commission is also suspended automatically from appearing or practicing before FHFA. A disbarment or suspension within the meaning of this paragraph shall be deemed to have occurred when the disbarring or suspending agency or tribunal enters its judgment or order, regardless of whether an appeal is pending or could be taken and regardless of whether a violation is admitted in the consent.

(2) A suspension or disbarment from practice before FHFA under paragraph (b)(1) of this section shall continue until the person suspended or disbarred is reinstated under paragraph (d)(2) of this section.

(c) *Notices to be filed.* (1) Any individual appearing or practicing before FHFA who is the subject of an order, judgment, decree, or finding of the types set forth in paragraph (b)(1) of this section shall file promptly with the Director a copy thereof, together with any related opinion or statement of the agency or tribunal involved.

(2) Any individual appearing or practicing before FHFA who is or within the last 10 years has been convicted of a felony or of a misdemeanor that resulted in a sentence of prison term or in a fine or restitution order totaling more than $5,000 promptly shall file a notice with the Director. The notice shall include a copy of the order imposing the sentence or fine, together with any related opinion or statement of the court involved.

(d) *Reinstatement.* (1) Unless otherwise ordered by the Director, an application for reinstatement for good cause may be made in writing by a person suspended or disbarred under paragraph (a)(1) of this section at any time more than three years after the effective date of the suspension or disbarment and, thereafter, at any time more than one year after the person's most recent application for reinstatement. An applicant for reinstatement hereunder may, in the Director's sole discretion, be afforded a hearing.

(2) An application for reinstatement for good cause by any person suspended or disbarred under paragraph (b)(1) of this section may be filed at any time, but not less than one year after the applicant's most recent application. An applicant for reinstatement for good cause hereunder may, in the Director's sole discretion, be afforded a hearing.

If, however, all the grounds for suspension or disbarment under paragraph (b)(1) of this section have been removed by a reversal of the order of suspension or disbarment or by termination of the underlying suspension or disbarment, any person suspended or disbarred under paragraph (b)(1) of this section may apply immediately for reinstatement and shall be reinstated by FHFA upon written application notifying FHFA that the grounds have been removed.

(e) *Conferences.*—(1) *General rule.* The FHFA counsel of record may confer with a proposed respondent concerning allegations of misconduct or other grounds for censure, disbarment, or suspension, regardless of whether a proceeding for censure, disbarment or suspension has been commenced. If a conference results in a stipulation in connection with a proceeding in which the individual is the respondent, the stipulation may be entered in the record at the request of either party to the proceeding.

(2) *Resignation or voluntary suspension.* In order to avoid the institution of or a decision in a disbarment or suspension proceeding, a person who practices before FHFA may consent to censure, suspension, or disbarment from practice. At the discretion of the Director, the individual may be censured, suspended, or disbarred in accordance with the consent offered.

(f) *Hearings under this section.* Hearings conducted under this section shall be conducted in substantially the same manner as other hearings under this part, except that in proceedings to terminate an existing FHFA suspension or disbarment order, the person seeking the termination of the order shall bear the burden of going forward with an application and with proof and that the Director may, in the Director's sole discretion, direct that any proceeding to terminate an existing suspension or disbarment by FHFA be limited to written submissions. All hearings held under this section shall be closed to the public unless the Director, on the Director's own motion or upon the request of a party, otherwise directs.

§§ 1209.76 through 1209.79 [Reserved].

Subpart E—Civil Money Penalty Inflation Adjustments

§ 1209.80 Inflation adjustments.

The maximum amount of each civil money penalty within FHFA's jurisdiction, as set by the Safety and Soundness Act and thereafter adjusted in accordance with the Inflation Adjustment Act, on a recurring four-year cycle, is as follows:

U.S. Code citation	Description	Adjusted maximum penalty amount
12 U.S.C. 4636(b)(1)	First Tier	$10,000
12 U.S.C. 4636(b)(2)	Second Tier	50,000
12 U.S.C. 4636(b)(4)	Third Tier (Entity-Affiliated party)	2,000,000

U.S. Code citation	Description	Adjusted maximum penalty amount
12 U.S.C. 4636(b)(4)	Third Tier (Regulated entity)	2,000,000

§ 1209.81 Applicability.

The inflation adjustments set out in § 1209.80 shall apply to civil money penalties assessed in accordance with the provisions of the Safety and Soundness Act, 12 U.S.C. 4636, and subparts B and C of this part, for violations occurring after the effective date of July 30, 2008.

§§ 1209.82 through 1209.99 [Reserved].

Subpart F—Suspension or Removal of an Entity-Affiliated Party Charged With Felony

§ 1209.100 Scope.

Subpart F of this part applies to informal hearings afforded to any entity-affiliated party who has been suspended, removed, or prohibited from further participation in the business affairs of a regulated entity by a notice or order issued by the Director under section 1377(h) of the Safety and Soundness Act (12 U.S.C. 4636a(h)).

§ 1209.101 Suspension, removal, or prohibition.

(a) *Notice of suspension or prohibition.* (1) As provided by section 1377(h)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(h)(1)), if an entity-affiliated party is charged in any information, indictment, or complaint, with the commission of or participation in a crime that involves dishonesty or breach of trust that is punishable by imprisonment for more than one year under State or Federal law, the Director may, if continued service or participation by such party may pose a threat to the regulated entity or impair public confidence in the regulated entity, by written notice served upon such party, suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of any regulated entity.

(2) In accordance with section 1377(h)(1) of the Safety and Soundness Act (12 U.S.C. 4636a(h)(1)), the notice of suspension or prohibition is effective upon service. A copy of such notice will be served on the relevant regulated entity. The notice will state the basis for the suspension and the right of the party to request an informal hearing as provided in § 1209.102. The suspension or prohibition is to remain in effect until the information, indictment, or complaint is finally disposed of, or until terminated by the Director, or otherwise as provided in paragraph (c) of this section.

(b) *Order of removal or prohibition.* As provided by section 1377(h)(2) of the Safety and Soundness Act (12 U.S.C. 4636a(h)(2)), at such time as a judgment of conviction is entered (or pretrial diversion or other plea bargain is agreed to) in connection with a crime as referred to above in paragraph (a) (the ''conviction''), and the conviction is no longer subject to appellate review, the Director may, if continued service or participation by such party may pose a threat to the regulated entity or impair public confidence in the regulated entity, issue an order removing such party from office or prohibiting such party from further participation in any manner in the conduct of the affairs of the regulated entity without the prior written consent of the Director. A copy of such order will be served on the relevant regulated entity, at which time the entity-affiliated party shall immediately cease to be a director or officer of the regulated entity. The notice will state the basis for the removal or prohibition and the right of the party to request a hearing as provided in § 1209.102.

(c) *Effective period.* Unless terminated by the Director, a notice of suspension or order of removal issued under section 1377(h)(1) or (2) of the Safety and Soundness Act (12 U.S.C. 4636a(h)(1), (2)) shall remain effective and outstanding until the completion of any informal hearing or appeal provided under section 1377(h)(4) of the Safety and Soundness Act (12 U.S.C. 4636a(h)(4)). The pendency of an informal hearing, if any, does not stay any notice of suspension or prohibition or order of removal or prohibition under subpart F of this part.

(d) *Effect of acquittal.* As provided by section 1377(h)(2)(B)(ii) of the Safety and Soundness Act (12 U.S.C. 4636a(h)(2)(B)(ii)), a finding of not guilty or other disposition of the charge does not preclude the Director from instituting removal, suspension, or prohibition proceedings under section 1377(a) or (b) of the Safety and Soundness Act (12 U.S.C. 4636a(a), (b)).

(e) *Preservation of authority.* Action by the Director under section 1377(h) of the Safety and Soundness Act (12 U.S.C. 4636a(h)), shall not be deemed as a predicate or a bar to any other regulatory, supervisory, or enforcement action under the Safety and Soundness Act.

§ 1209.102 Hearing on removal or suspension.

(a) *Hearing requests.*—(1) *Deadline.* An entity-affiliated party served with a notice of suspension or prohibition or an order of removal or prohibition, within 30 days of service of such notice or order, may submit to the Director a written request to appear before the Director to show that his or her continued service or participation in the affairs of the regulated entity will not pose a threat to the interests of, or threaten to impair public confidence in, the Enterprises or the Banks. The request must be addressed to the Director and sent to the Federal Housing Finance Agency at 1700 G Street, NW., Washington, DC 20552, by:

(i) Overnight U.S. Postal Service delivery or delivery by a reliable commercial delivery service for same day or overnight delivery to the address stated above; or

(ii) First class, registered, or certified mail via the U.S. Postal Service.

(2) *Waiver of appearance.* An entity-affiliated party may elect in writing to waive his or her right to appear to make a statement in person or through counsel and have the matter determined solely on the basis of his or her written submission.

(b) *Form and timing of hearing.*—(1) *Informal hearing.* Hearings under subpart F of this part are not subject to the formal adjudication provisions of the Administrative Procedure Act (5 U.S.C. 554 through 557), and are not conducted under subpart C of this part.

(2) *Setting of the hearing.* Upon receipt of a timely request for a hearing, the Director will give written notice and set a date within 30 days for the entity-affiliated party to appear, personally, or through counsel, before the Director or his or her designee(s) to submit written materials (or, at the discretion of the Director, oral testimony and oral argument) to make the necessary showing under paragraph (a) of this section. The entity-affiliated party may submit a written request for additional time for the hearing to commence, without undue delay, and the Director may extend the hearing date for a specified time.

(3) *Oral testimony.* The Director or his or her designee, in his or her discretion, may deny, permit, or limit oral testimony in the hearing.

(c) *Conduct of the hearing.*—(1) *Hearing officer.* A hearing under this section may be presided over by the Director or one or more designated FHFA employees, except that an officer designated by the Director (hearing officer) to conduct the hearing may not have been involved in an underlying criminal proceeding, a factually related proceeding, or an enforcement proceeding in a prosecutorial or investigative role. This provision does not preclude the Director otherwise from seeking information on the matters at issue from appropriate FHFA staff on an as needed basis consistent with § 1209.101(d)(2).

(2) *Submissions.* All submissions of the requestor and FHFA's counsel of record must be received by the Director or his or her designee no later than 10 days prior to the date set for the hearing. FHFA may respond in writing to the requestor's submission and serve the requestor (and any other interested party such as the regulated entity) not later than the date fixed by the hearing officer for submissions or other time period as the hearing officer may require.

(3) *Procedures.*—(i) *Fact finding authority of the hearing officer.* The hearing officer shall determine all procedural matters under subpart F of this part, permit or limit the appearance of witnesses in accordance with paragraph (b)(3) of this section, and impose time limits as he or she deems reasonable. All oral statements, witness testimony, if permitted, and documents submitted that are found by the hearing officer to be materially relevant to the proceeding and not unduly repetitious may be considered. The hearing officer may question any person appearing in the proceeding, and may make any ruling reasonably necessary to ensure the full and fair presentation of evidence and to facilitate the efficient and effective operation of the proceeding.

(ii) *Statements to an officer.* Any oral or written statement made to the Director, a hearing officer, or any FHFA employee under subpart F of this part is deemed to be a statement made to a Federal officer or agency within the meaning of 18 U.S.C. 1006.

(iii) *Oral testimony.* If either the requestor or FHFA counsel of record desires to present oral testimony to supplement the party's written submission he or she must make a request in writing to the hearing officer not later than 10 days prior to the hearing, as provided in paragraph (c)(2) of this section, or within a shorter time period as permitted by the hearing officer for good cause shown. The request should include the name of the individual(s), a statement generally descriptive of the expected testimony, and the reasons why such oral testimony is warranted. The hearing officer generally will not admit witnesses, absent a strong showing of specific and compelling need. Witnesses, if admitted, shall be sworn.

(iv) *Written materials.* Each party must file a copy of any affidavit, memorandum, or other written material to be presented at the hearing with the hearing officer and serve copies on any other interested party (such as the affected regulated entity) not later than 10 days prior to commencement of the informal hearing, as provided in paragraph (c)(2), or within a shorter time period as permitted by the hearing officer for good cause shown.

(v) *Relief.* The purpose of the hearing is to determine whether the suspension or prohibition from participation in any manner in the conduct of the affairs of the regulated entity will be continued, terminated, or otherwise modified, or whether the order removing such party from office or prohibiting the party from further participation in any manner in the conduct of the affairs of the regulated entity will be rescinded or otherwise modified.

(vi) *Ultimate question.* In deciding on any request for relief from a notice of suspension or prohibition, the hearing officer shall not consider the ultimate question of guilt or innocence with respect to the outstanding criminal charge(s). In deciding on a request for relief from a removal order, the hearing officer shall not consider challenges to or efforts to impeach the validity of the conviction. In either case, the hearing officer may consider facts that show the nature of the events on which the conviction or charges were based.

(4) *Record.* If warranted under the circumstances of the matter, the hearing officer may require that a transcript of the proceedings be prepared at the expense of the requesting party. The hearing officer may order the record be kept open for a reasonable time following the hearing, not to exceed five business days, to permit the filing of additional pertinent submissions for the record. Thereafter, no further submissions are to be admitted to the record, absent good cause shown.

§ 1209.103 Recommended and final decisions.

(a) *Recommended decision.*—(1) *Written recommended decision of the hearing officer.* Not later than 20 days following the close of the hearing (or if the requestor waived a hearing, from the deadline for submission of the written materials), the hearing officer will serve a copy of the recommended decision on the parties to the proceeding. The recommended decision must include a summary of the findings, the parties' respective arguments, and support for the determination.

(2) *Five-day comment period.* Not later than five business days after receipt of the recommended decision, the parties shall submit written comments in response to the recommended decision, if any, to the hearing officer. The hearing officer shall not grant any extension of the stated time for responses to a recommended decision.

(3) *Recommended decision to be transmitted to the Director.* The hearing officer shall promptly forward the recommended decision, and written comments, if any, and the record to the Director for final determination.

(b) *Decision of the Director.* Within 60 days of the date of the hearing, or if the requestor waived a hearing the date fixed for the hearing, the Director will notify the entity-affiliated party in writing by registered mail of the disposition of his or her request for relief from the notice of suspension or prohibition or the order of removal or prohibition. The decision will state whether the suspension or prohibition will be continued, terminated, or otherwise modified, or whether the order removing such party from any participation in the affairs of the regulated entity will be rescinded or otherwise modified. The decision will contain a brief statement of the basis for an adverse determination. The Director's decision is a final and non-appealable order.

(c) *Effect of notice or order.* A removal or prohibition by order shall remain in effect until terminated by the Director. A suspension or prohibition by notice remains in effect until the criminal charge is disposed of or until terminated by the Director.

(d) *Reconsideration.* A suspended or removed entity-affiliated party subsequently may petition the Director to reconsider the final decision any time after the expiration of a 12-month period from the date of the decision, but no such request may be made within 12 months of a previous petition for reconsideration. An entity-affiliated party must submit a petition for reconsideration in writing; the petition shall state the specific grounds for relief from the notice of suspension or order or removal and be supported by a

memorandum and any other documentation materially relevant to the request for reconsideration. No hearing will be held on a petition for reconsideration, and the Director will inform the requestor of the disposition of the reconsideration request in a timely manner. A decision on a request for reconsideration shall not constitute an appealable order.

CHAPTER XVII—OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Subchapter D—Rules of Practice and Procedure

PART 1780—[REMOVED]

■ 3. Remove part 1780.

Dated: August 16, 2011.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

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